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Constitutional Law and the Law of Evidence

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CONSTITUTIONAL LAW AND THE LAW OF EVIDENCE

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When a constitutional right conflicts with an evidentiary rule that would otherwise allow a piece of evidence to be admitted at trial, should the constitutional right be a "trump"? The Supreme Court and lower courts have often interpreted the Constitution to abstain from regulating questions of trial evidence. Taking the opposite course, courts have displaced evidence law to dramatic effect, as with the Court's exclusionary rule, Confrontation Clause, and punitive damages jurisprudence. In areas that provide a more attractive model, the Court has instead sought to accommodate constitutional and evidence law. The fundamental problem of adjudicating the intersection of the Constitution and the law of evidence has not been the subject of judicial standards or academic commentary. Despite their importance, such questions have been seen as confined to the particular criminal or civil procedure contexts in which they arise. Indeed, I argue that due to this neglect, important rights, such as the Miranda *right, have been misunderstood as outliers, subconstitutional, or merely prophylactic. This Article develops why constitutional evidence law should in some respects be viewed apart from other areas of constitutional law. Second, I explore what norms should define the intersection of constitutional and evidence law. Third, I set out a framework in the form of standards of constitutional review, standards for avoidance, and canons of interpretation to govern intersections of constitutional law and the law of evidence. This Article ultimately seeks to describe the ways in which constitutional rights can intersect with rules of evidence and how courts might more clearly and consistently approach such conflicts and questions. Far from a subject to be avoided, constitutional rights have long protected against evidentiary abuses at trial. Conversely, evidence law principles can improve the effectiveness of constitutional protections and prevent unanticipated erosion of constitutional rights.*

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INTRODUCTION

When a constitutional right conflicts with an evidentiary rule that would otherwise bar or allow a piece of evidence to be admitted at trial, should the constitutional right always be a "trump"? Since the U.S. Constitution is the supreme law of the

land, one would expect constitutional rights to apply and to then change the result at a civil or criminal trial. Yet courts, including the Supreme Court, have frequently interpreted the Constitution to abstain from questions of evidence law. Sometimes, however, courts have taken the opposite course, as in the case of the exclusionary rule, and have outright displaced evidence law to dramatic effect. Despite their importance, the problems that lie at the intersection of the Constitution and the law of evidence have typically been seen as separate and confined to the particular criminal or civil procedure or evidentiary contexts in which they arise.[1] Nor have courts adopted any consistent framework for answering the questions that arise by fashioning standards of review or canons of interpretation. This Article aims to explore this as a general problem, to describe the ways constitutional rights can intersect with rules of evidence, and to propose how courts could more clearly and consistently approach such difficult questions.

The Supreme Court has long sought to explain how it tries to minimize conflict between constitutional rights and the complex and tradition-bound body of state and federal evidence law. As Justice Robert H. Jackson colorfully and famously put it, writing for the Court in *Michelson v. United States*: "To pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice."[2] Constitutional rights that regulate civil and criminal procedure inevitably conflict with rules that govern what evidence can be admissible at a trial. The Court often justifies abstinence from questions of evidence by noting that it is poorly situated, given the posture at which cases come before it, to regulate trial evidence. As the Court has put it, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."[3]

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1 This is despite the fact that, as Professor Mitchell Berman has advanced, constitutional scholars increasingly examine metadoctrine, or how constitutional rules or "decision rules" interact with and result in remedies. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 3–4 (2004). Rules of evidence deeply affect the practical resolution of constitutional rules and, conversely, while constitutional rights affecting evidence, such as the *Miranda* right, can be seen as "decision rules," *id.* at 115–16, I argue that such constitutional questions can be better understood as the application of a constitutional standard to a question of evidence. For discussion of how to understand rights like the *Miranda* right under this view of constitutional evidence law, see *infra* Section II.B.2.

2 335 U.S. 469, 486 (1948).

3 Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983).

More recently, in *Perry v. New Hampshire*, the Court distanced itself from due process reliability-related concerns with eyewitness-identification evidence and stated that rules of evidence could suffice to regulate any such problems.[4] In a recent Confrontation Clause decision, Justice Anthony Kennedy dissented, arguing the Court should not so lightly "sweep[ ] away an accepted rule governing the admission of scientific evidence."[5] The Court cited this language approvingly in the majority opinion in *Williams v. Illinois*,[6] in which Justice Clarence Thomas concurred, but countered, "I do not think that rules of evidence should so easily trump a defendant's confrontation right," and Justice Elena Kagan in turn dissented, calling the result "abdication to state-law labels."[7] The inconsistent views expressed by the Justices in such opinions highlight the importance of the problem. Moreover, the reasoning regarding what I characterize as conflicts between evidence law and constitutional law is quite distinct from that in areas in which scholars have more generally observed "underenforced constitutional norms."[8] In this Article, I argue that when and whether constitutional rights demand evidentiary outcomes are distinct problems lacking adequate guidance. The Court and lower state and federal courts cannot so easily avoid engaging with the content and purposes of evidence rules when interpreting constitutional rights, and nor should they.

Indeed, the Supreme Court sometimes throws caution to the wind when Justices proclaim a contrary intent to displace evidence law outright. If anything, the Court has become more open over time to interpreting constitutional rights in a way that displaces traditional or statutory rules of evidence. By rules of evidence, I refer throughout not only to common-law and statutory exclusionary rules that operate at a trial but also, and more broadly, to the rules surrounding preservation of privilege pretrial and other aspects of trial practice that regulate evidence, such as jury instructions that explain evidence to the factfinder.[9] The Warren Court's criminal procedure

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4 132 S. Ct. 716, 729 (2012) (stating that rules of evidence, expert testimony, and jury instructions provide "safeguards" of reliability of eyewitness evidence).

5 Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330 (2009) (Kennedy, J., dissenting).

6 132 S. Ct. 2221 (2012).

7 *Id.* at 2272 (Kagan, J., dissenting); *id.* at 2256 (Thomas, J., concurring).

8 Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978).

9 Professor Edward J. Imwinkelried provides a useful definition of evidence law as "the common-law and statutory exclusionary rules of evidence—rules such as the hearsay and opinion doctrines, which operate to exclude logically relevant

revolution is part of the reason the approach towards constitutionalizing evidence law changed; evidentiary rules were overturned as unconstitutionally denying a fundamentally fair trial. The modern exclusionary rule is the most high-profile example, in which evidence that might be quite reliable and clearly admissible under state and federal evidence law, following the Court's landmark ruling in *Mapp v. Ohio*, must sometimes be excluded under the Fourth Amendment.[10] Similarly, the Court long interpreted the Compulsory Process Clause to accommodate evidentiary privileges, but beginning in the late 1960s, the Court changed course and found the Clause sometimes permits a criminal defendant the right to introduce evidence even in direct contravention of evidentiary privileges.[11] That gradual process of recognizing that certain extreme applications of rules of evidence could result in an unfair trial was displaced by the revolution that the Court's 2004 decision *Crawford v. Washington* heralded for the law of hearsay in criminal cases.[12] The Confrontation Clause jurisprudence turned away from an approach accommodating traditional hearsay rules and exceptions and instead adopted a constitutional test asking whether evidence is "testimonial" in nature, which was drawn from common-law restrictions on out-of-court testimony. Rather than displacing rules of evidence due to skepticism of the jury's fact-finding ability, such rulings view the constitutional right as a distinct "trump."[13]

Yet in other areas, as noted, the Supreme Court has expressed real reluctance to regulate evidence law using the Constitution. As Professor Alex Stein has put it, constitutional law has tended to supplant evidence law only "in extreme cases" that exhibit "fundamental unfairness" implicating the Due Process Clause.[14] However, that gloss does not sufficiently explain

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evidence." Edward J. Imwinkelried, *The Pretrial Importance and Adaptation of the "Trial" Evidence Rules*, 25 LOY. L.A. L. REV. 965, 965 (1992).

10 367 U.S. 643, 655 (1961).

11 *See infra* Subpart III.B.

12 Crawford v. Washington, 541 U.S. 36, 62 (2004) ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.").

13 *See* John H. Langbein, *Historical Foundations of the Law of Evidence: A View from the Ryder Sources*, 96 COLUM. L. REV. 1168, 1201–02 (1996) (attributing the birth of the modern law of evidence in the eighteenth century to the rise of the adversarial criminal trial, which created a need to control the evidence that was presented to juries); Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 166 n.5 (2006) (describing the broad scholarly debates over which view animates evidence law).

14 Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 66 (2008); *see also id.* at 124 ("The Court therefore avoids telling state courts and legislators how

all of the Court's due process rulings nor rulings regarding other rights, such as the Fourth Amendment exclusionary rule or the Confrontation Clause. I conclude in Part I by exploring what rationales courts give when declining to regulate evidence law.

In Part II, I describe a deeper connection between constitutional rights and evidence law. I argue that it is doubtful that any constitutional right that relates to the civil or criminal trial process can succeed in either ignoring or creating a clean break with the body of evidence law. This either/or approach explains, in my view, why scholars on both sides of the decades-long debates have misunderstood the *Miranda* right, viewing it as an outlier because the Supreme Court interpreted the Fifth Amendment to require out-of-court provision of warnings by police with in-court evidentiary consequences.[15] Scholars have tried to categorize *Miranda* as constitutional common law,[16] or subconstitutional,[17] or a decision rule versus a remedy.[18] Instead, I argue that *Miranda* is simply an example of constitutional evidence law, in which the Constitution regulates a question of evidence (the admissibility of compelled statements by a criminal suspect) and must therefore develop the meaning of the constitutional right in the context of the standard fare of evidentiary privileges and rules (including rules for waiver and preservation of privilege) in order to give the right adequate effect.

Nor is *Miranda* exceptional. I explore in Part II how in a host of areas the Court has tried to moderate the impact of constitutional rights by creating interpretations and exceptions that at times take careful account of evidentiary concerns. Although I argue that when constitutional law and evidence law intersect an explicit intersectional analysis is necessary, the analysis can be quite challenging. The complex post-*Crawford* case law suggests how replacing the existing rules of evidence

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to design and apply their evidence rules. Yet for extreme deviations from its vision of due process, the Court retains a residual power to interfere.").

15 Miranda v. Arizona, 384 U.S. 436, 471–74 (1966).

16 *See* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 4–6 (1985); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975).

17 Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 43 (2001); Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible "Prophylactic" Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 300 (1996); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988). *Dickerson v. United States* put to rest that possible interpretation of *Miranda*. 530 U.S. 428, 432 (2000).

18 Berman, *supra* note 1, at 127.

with a brand new constitutional test can raise difficult new problems.[19] Similarly, the Supreme Court has sought to constrain civil punitive damages awards under the Due Process Clause, using factors designed for use on appeal. Yet the Court over time faced the need to engage more carefully with the content of jury instructions and the evidence jurors hear.[20] The Court has sometimes come back around from its posture of abstinence from evidence law by later interpreting rights to try to minimize impact on evidence law. The Court has tried to mitigate the impact of the Fourth Amendment exclusionary rule by crafting an ever-increasing set of exceptions that are not reliability based.[21] I highlight the case of eyewitness identifications, in which the due process rule permits trial judges to excuse a violation based on an ostensibly evidentiary analysis. Drawing on some form of evidence law was salutary. Unfortunately, the example provides a cautionary tale as well. The content of the Court's due process test itself provides trial judges largely unfettered discretion whether to admit eyewitness identifications for reasons that bear little on the reliability of an eyewitness and that have been criticized by the scientific community as so flawed that the test should be jettisoned.[22]

In Part III, I argue that abstinence is not the best policy, nor is it feasible. Constitutional interpretation may often call for rules that affect what evidence can or cannot be used in court. Instead, the Court should explicitly consider whether a constitutional rule regulating official conduct also requires evidentiary directions regarding what types of proof of violations are appropriate. Even when, as sometimes may be appropriate, a court interprets constitutional rights to displace traditional evidence law, the Court should still explain and engage with the sources of conflict in order to minimize potential confusion in the lower courts. Evidence law presents a particularly complex problem of what Professor Doni Gewirtzman has called "lower court constitutionalism."[23] I argue that a court can and should clearly address sources of conflict with a constitutional rule, address what evidentiary use that rule should be put to, set out what the state of the evidence rule is and the values underlying it, and only then decide whether the

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19 *See infra* Part I.

20 *See infra* Part II.

21 *See, e.g.*, Herring v. United States, 555 U.S. 135, 137 (2009) (recognizing "good faith" exception to exclusionary rule).

22 *See infra* Section I.B.1.

23 Doni Gewirtzman, *Lower Court Constitutionalism: Circuit Court Discretion in a Complex Adaptive System*, 61 AM. U. L. REV. 457, 481–89 (2012).

evidence-law rule deserves any degree of deference. Standard rules of constitutional avoidance are not warranted in an area in which evidence rules are not chiefly the product of statute. Instead, careful consideration of the effect of constitutional rules on evidentiary practice is warranted. Current federal and state evidence rules may have an integrity and structure that courts should not always tamper with, as Professor Fred Schauer has argued.[24] At the same time, many evidence-law rules are notoriously lacking in empirical support and outdated.[25]

Evidence law did not radically change over the past century, while constitutional law has. Now evidence rules may be playing catch-up and taking more rapid account of evolving scientific research than constitutional doctrine can. Some variation in pretrial and trial practice, if not outright conflict, is inevitable as constitutional rulings filter down to lower courts. In some areas, either displacing or updating evidence law and trial practice is highly desirable. Despite an oft-stated avoidance of interfering with the body of evidence law and accompanying trial and pretrial practice, some of it warranted and some not, I conclude in Part III by describing different ways that federal and state courts can interpret constitutional rights to add value to evidence law without creating unintended confusion. A more detailed understanding of the core evidentiary concerns of the constitutional right and whether or not they are compatible with evidence law could advance the doctrine. The U.S. Supreme Court's role is far clearer when interpreting Federal Rules of Evidence that apply uniformly to all federal courts (and that have been adopted by many state courts). As a result, rulings like the *Daubert v. Merrell Dow Pharmaceuticals* ruling guiding a judge's task when weighing admissibility of expert evidence widely influence federal and state courts.[26] In contrast, constitutional-law rulings using terms and standards outside of evidence law pose greater risks for conflict and confusion in doctrine and practice.

This Article supplies both cautionary tales and positive encouragement. Constitutional rules may create rules of decision but they can also create rules of evidence. When they do so, it should be intentional and the relationship between constitu-

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24 Schauer, *supra* note 13, at 194–95.

25 Samuel R. Gross, *Law in the Backwaters: A Comment on Mirjan Damaška's* Evidence Law Adrift, 49 HASTINGS L.J. 369, 370 (1998) ("Trial practice, and evidence law in particular . . . have changed far less in this century than the procedural and substantive legal framework that surrounds them.").

26 509 U.S. 579 (1993).

tional law and evidence law carefully explained. Conversely, evidence rules can under-enforce constitutional norms. Getting the connection between constitutional law and the law of evidence right has great importance, and neglect of this problem has not only led to misunderstanding of the status of doctrines like the *Miranda* doctrine but real confusion in Confrontation Clause jurisprudence, punitive damages jurisprudence, and longstanding neglect of values like accuracy in criminal procedure, where evidence-law concerns with reliability could better inform constitutional values. Judicial adoption of the proposed set of standards for adjudicating conflicts may improve both the quality of evidence law and litigation outcomes but also the care with which constitutional rights are enforced in the lower courts.

I
EVIDENCE-LAW CONFLICT WITH CONSTITUTIONAL RIGHTS

Justice Jackson, writing for the Supreme Court, put the problem of the Court's role in relation to the law of evidence well in *Michelson v. United States* in 1948, describing the particular issue in the case regarding the use of a criminal defendant's good character evidence as follows:

> The law of evidence relating to proof of reputation in criminal cases has developed almost entirely at the hands of state courts of last resort, which have such questions frequently before them. This Court, on the other hand, has contributed little to this or to any phase of the law of evidence, for the reason, among others, that it has had extremely rare occasion to decide such issues, as the paucity of citations in this opinion to our own writings attests. It is obvious that a court which can make only infrequent sallies into the field cannot recast the body of case law on this subject in many, many years, even if it were clear what the rules should be.[27]

And in rejecting the proposed rule regarding cross-examination about a defendant's prior arrests, the Court added: "The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic."[28]

Perhaps without intending to do so, the Supreme Court's ruling did affect trial practice. A casual phrase in Justice Jackson's majority opinion noted that, in line with its prior

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27 335 U.S. 469, 486 (1948).
28 *Id.* at 487.

holding in *Edgington*, good character evidence "is sometimes valuable to the defendant" because it "may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed."[29] Lower courts then had to discuss, and some rejected, the proposition that a jury should be specially charged that good character evidence can "alone" generate reasonable doubt in a criminal case.[30] Some trial judges gave that instruction, and some courts, such as the Second Circuit Court of Appeals, endorsed "hybrid" charges using the "standing alone" language and noting that character evidence be considered along with other evidence.[31] Pattern jury instruction books included jury instructions based on that reference in *Michelson*.[32]

As a result, a decision taking great pains to state an intent to avoid interference with the "grotesque structure" of traditional evidence law instead led lower courts and drafters of pattern jury instructions to seize on isolated dicta concerning the possible value of good character evidence and the use of "potentially misleading and confusing" jury charges.[33]

More broadly, the Supreme Court's decision, in making still additional statements concerning the particular good character evidence in the case, endorsed what Professor David Sklansky points out is "the bizarre practice of impeaching a defendant's character witnesses by asking whether they have heard rumors about the defendant that are never shown to be

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29 *Id.* at 484; *see also* Edgington v. United States, 164 U.S. 361, 366 (1896) (noting "good character" in the right circumstances could "alone create a reasonable doubt").

30 *See, e.g.*, United States v. Pujana-Mena, 949 F.2d 24, 30 (2d Cir. 1991) ("[N]either *Edgington* nor *Michelson* compels an instruction telling the jury that character evidence 'standing alone' may create a reasonable doubt.").

31 *Id.* at 31. However, the court noted that while it might not be an abuse of discretion to provide such an instruction, "not only does such a hybrid charge not cure the problems of the 'standing alone' charge, it may add to them. A charge telling the jury to consider character evidence both *alone* and *together with all the other evidence* is inherently confusing and contradictory." *Id.*

32 *See id.* (noting that "several frequently used pattern jury instruction books" contain charges using the "standing alone" language) (citing 1 L. SAND, J. SIFFERT, W. LOUGHLIN & S. REISS, MODERN FEDERAL JURY INSTRUCTIONS (CRIMINAL) 5–33 (1991) (Instruction 5-15)).

33 *Id.* at 32. For the general point that *Michelson* "roundly lambasts the 'common law tradition' governing character proof while upholding it in the end," see Daniel D. Blinka, *Character, Liberalism, and the Protean Culture of Evidence Law*, 37 SEATTLE U. L. REV. 87, 138 (2013). While several federal courts adopted the "standing alone" instruction, apparently "judicial dissatisfaction with the illogic of that approach appears to have won the day in federal courts, and at present, none of the 12 federal circuit courts of appeals requires a 'standing alone' instruction . . . ." 3 JONES ON EVIDENCE § 16:26 (7th ed. 2013).

true—or even proven to be actual rumors," by saying that limiting instructions might cure the defect, even if, as Justice Jackson acknowledged, the trial judge's instructions were "almost unintelligible."[34] Why the Court needed to do that, when ostensibly adhering to established character evidence law, raises still more questions about the case and the larger problem of decisions that have an unintended impact on the law of evidence.

That experience alone, in the wake of the very Supreme Court decision, perhaps due to Justice Jackson's characteristic eloquence, that more than any other is cited for the proposition that the Court should steer clear of unnecessary changes to evidence law, suggests the pitfalls of such engagement and the potential for perverse and unintended outcomes without adopting a clear approach to such questions. To be sure, the *Michelson* case did not involve a constitutional rule coming into conflict with a rule of evidence. One would expect that a constitutional rule would more routinely "trump" any conflicting evidentiary rules.

In the decades that followed, the Court would embark on a range of projects, following the incorporation of much of the Bill of Rights as against the States, that would bring constitutional criminal procedure rights in particular but also some civil rights, into sharp conflict with rules of evidence. The same concerns with upsetting the edifice of evidence-law rules and remedies would apply, but with the countervailing concern that constitutional rights be vindicated and with still additional federalism concerns, when varying state law of evidence might come into conflict with federal constitutional rights. Over time, the Court became more and more willing to interpret constitutional rights in a way that regulated evidence in ways that sharply differed from the traditional way that evidence had been handled. As noted, scholars have, when they have commented on such rulings, characterized the Court as largely avoiding regulation of state evidence law, with the Due Process Clause largely confined to preventing extreme and fundamental unfairness; in particular, the Court has been leery of regulating the reliability of evidence, even in criminal cases in which claims of innocence are raised.[35]

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34 David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 447–48 (2013) (quoting Michelson v. United States, 335 U.S. 469, 485 (1948)).

35 *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 407–08 (1993) ("[B]ecause the States have considerable expertise in matters of criminal procedure . . . we have

However, scholars have not examined the general problem of what a court should do when properly confronted with an outright or potential conflict between the outcome under an evidentiary rule and a constitutional right (as is often the case, evidentiary objections are frequently unpreserved or found harmless by the time they reach appellate courts). There are two basic outcomes that could result. The constitutional right could be interpreted as not applying and the evidence rule could apply as it ordinarily would, permitting or barring introduction of the relevant piece of evidence. Or the constitutional right could trump evidence law, leading to a different outcome than would otherwise result.

What explains the circumstances when the constitutional right trumps or not? It is not immediately apparent. One might expect that constitutional rights would *always* trump evidence law, whether state or federal, since constitutional law is authority of the highest order. And that sometimes occurs, as described in the subpart that follows. Prominent examples include recent Confrontation Clause rulings, the exclusionary rule, Fifth Amendment rulings, and Compulsory Process Clause rulings, in which the constitutional right displaced longstanding evidence law. And yet this body of constitutional evidence law should be understood alongside the body of areas in which the Court has declined to displace longstanding evidence law. In the next subpart, I will turn to those cases.

A. Constitutional Law Trumping Evidence Law

While the Court often defines its reasons for abstinence in terms of federalism, comity, and finality, the Court's approach has been far more complex, both inside and outside its due process jurisprudence. This subpart describes the major examples of the Court displacing evidence law, as well as examples of the Court deferring to evidence law, in order to contrast the two opposite outcomes and begin to understand as a descriptive matter what explains the opposing approaches. The Parts that follow will then examine these outcomes more critically and offer an alternative framework to govern constitutional and evidence-law intersections.

'exercis[ed] substantial deference to legislative judgments in this area.'" (quoting Medina v. California, 505 U.S. 437, 445–46 (1992))).

1. *The Confrontation Clause*

The Supreme Court's recent Confrontation Clause jurisprudence over the past few decades has been nothing short of a revolution. The Court abandoned earlier reliance on evidence-law concepts and instead adopted a constitutional-specific test that results in outcomes quite different than if the traditional evidence-law rules applied. The rejection of evidence law could not have been more dramatic; in its intent, at least, the lower courts predicted that the Court had worked a "sea change," a "paradigm shift," or a "Copernican shift."[36]

The Court's earlier Confrontation Clause approach had emphasized that out-of-court statements could be admitted if there were "indicia of reliability,"[37] based on the circumstances, or if the evidence fell within a particular hearsay exception.[38] The approach accommodated evidence-law rules within the constitutional framework. As the Court put it in *Ohio v. Roberts*, one reason why not all witnesses must be produced at trial is that "every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."[39] The Court cited deference to local development of the rules of evidence as a reason not to superimpose inflexible constitutional rules requiring confrontation in all circumstances. The Court adopted a constitutional rule in deference to state and federal evidence rules rather than displacing them.

Further, the Supreme Court recognized common interests between the two bodies of constitutional and evidence law: "[H]earsay rules and the Confrontation Clause are generally designed to protect similar values."[40] The Court noted that its approach, "[t]rue to the common-law tradition, . . . has been gradual, building on past decisions, drawing on new experience, and responding to changing conditions."[41] That is not to say that the Court always reflexively deferred to state evidence-

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36 Jerome C. Latimer, *Confrontation After* Crawford*: The Decision's Impact on How Hearsay Is Analyzed Under the Confrontation Clause*, 36 SETON HALL L. REV. 327, 329–30 (2006) (citations omitted).

37 Dutton v. Evans, 400 U.S. 74, 89 (1970).

38 *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) (holding that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" or where it bears "particularized guarantees of trustworthiness").

39 *Id.* at 64; *see also* Thomas J. Reed, Crawford v. Washington *and the Irretrievable Breakdown of a Union: Separating the Confrontation Clause from the Hearsay Rule*, 56 S.C. L. REV. 185, 201 (2004) (criticizing this justification).

40 California v. Green, 399 U.S. 149, 155 (1970).

41 *Roberts*, 448 U.S. at 64.

law rules. Over time, the Court found that conflicts that threatened the fairness of trials in a fundamental way led to the Confrontation Clause trumping state law. In *Davis v. Alaska,* for example, despite noting sound reasons to protect the privacy of juvenile offenders, the Court had concluded that "[i]n this setting . . . the right of confrontation is paramount to the State's policy of protecting a juvenile offender."[42] However, the approach, as the Court correctly described it, was incremental.

The Supreme Court abandoned that evidence-law informed and case-by-case approach in its revolutionary opinion in *Crawford v. Washington*. As the Court explained in its opinion in *Crawford,* "[l]eaving the regulation of out-of-court statements to the law of evidence" renders "the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices."[43] The Court added: "[W]e once again reject the view that the Confrontation Clause['s] . . . application to out-of-court statements . . . depends upon 'the law of Evidence for the time being.'"[44] Instead, the Court ruled that absent a prior opportunity for cross-examination, if the witness is available at the time of trial, a statement that is "testimonial" and offered for the truth of the matter asserted, the statement is barred from trial if the witness is not produced for defense confrontation at a criminal trial.[45] In adopting this test, the Court rejected the approach it had adhered to in prior decades relying on reliability, emphasizing: "[W]e do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'"[46] The Court criticized the use of "countless factors bearing on whether a statement is reliable."[47] The Court, in the majority opinion authored by Justice Antonin Scalia, instead emphasized the original meaning of the Confrontation Clause at the time of its adoption, a view that the Clause codified a common-law approach towards out-of-court statements by witnesses, and the Court emphasized its text, focusing on "witnesses" who "bear testimony."[48] Thus, rather than accommodating evolving law of hearsay, the Court adopted an

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42 415 U.S. 308, 319 (1974).

43 *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

44 *Id.* at 50–51 (quoting 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d ed. 1923)).

45 *Id.* at 68.

46 *Id.* at 61.

47 *Id.* at 63.

48 *Id.* at 51–56.

approach in which the Clause reflected an understanding, right or wrong, of the common-law rules for out-of-court statements.[49]

The test the Court adopted can be compared, as discussed later in the next Part, with the Court's embrace of a multifactored concept of reliability in the area of eyewitness-identification evidence, for example, and with a more equivocal use of reliability in the law of confessions. However, one area where the Court similarly rejected current evidence law as a source, and viewed the constitutional right as trumping reliability (at least initially), is the Fourth Amendment exclusionary rule, perhaps the best-known and most significant piece of constitutional evidence law of all. Nor can the different approaches be so readily explained by differences in constitutional text or original meaning. Moreover, the relationship between originalist interpretation and reliance on practical considerations has become more complex in the decisions that have followed *Crawford*.[50] As discussed in the next Part, the post-*Crawford* cases have departed farther from any grounding in original meaning, and have instead engaged with current evidence rules and developed constitutional evidence-law principles accommodating and explaining the intersection between a Confrontation Clause rule focusing on "testimonial" evidence and evidence-law rules and process.

2. *The Exclusionary Rule*

The Supreme Court has held that the exclusionary rule, adopted to make more effective the Fourth Amendments right of citizens to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,"[51] bars the admissibility of evidence obtained in violation of the Fourth Amendment, as well as the evidentiary fruits of illegally seized evidence.[52] In *Mapp v. Ohio,* the Court incorporated that exclusionary rule, which had been adopted as a matter of federal

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49 *See* David Alan Sklansky, *Confrontation and Kabuki*, 20 J.L. & POL'Y 501, 515 (2012) (describing the relationship between originalist arguments in the Court's recent Confrontation Clause decisions and more pragmatic considerations).

50 For an elegant analysis of the growing tension between the originalist and pragmatic strains in this growing body of law, see generally Sklansky, *supra* note 49.

51 U.S. CONST. amend. IV.

52 *See* Wolf v. Colorado, 338 U.S. 25, 28–29 (1949); Weeks v. United States, 232 U.S. 383, 393 (1914).

evidence law for many decades, as against the states.[53] The Court announced: "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."[54] The rule announced in *Mapp,* a case that involved egregious police misconduct, was intended primarily to "[d]eter future unlawful police conduct" and provide a "judicially created remedy designed to safeguard Fourth Amendment rights generally," rather than to provide a rule of evidence in criminal cases.[55] The rule does, however, alter the operation of evidentiary rules by creating a constitutional bar on the admissibility of evidence that would otherwise be admissible (and potentially highly probative of guilt) in criminal cases.

Far from reflecting traditional evidence-law concerns, such as relevance or reliability, the Court has noted that the exclusionary rule "almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence."[56] The Fourth Amendment had previously been treated as not resulting in an evidentiary remedy at all; prior to *Mapp,* a state official's violation of the Fourth Amendment might result in a civil damages claim but not a bar on introduction of evidence in a criminal case in state court.[57] As Chief Justice William Howard Taft put it in *Olmstead v. United States,* describing the adoption of the exclusionary rule in federal court: "Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant."[58] A Fourth Amendment violation had no evidentiary consequences. Moreover, constitutional text did not demand an exclusionary result. It was "striking" that as a result of *Mapp* "the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction."[59] The Fourth Amendment regulates the admis-

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53 Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wong Sun v. United States, 371 U.S. 471, 484 (1963).

54 *Mapp*, 367 U.S. at 655.

55 United States v. Calandra, 414 U.S. 338, 347–48 (1974). As Justice Lewis Powell later put it, the exclusionary rule does not provide "a personal constitutional right," and it was not designed to "redress the injury" of the Fourth Amendment violation. Stone v. Powell, 428 U.S. 465, 486 (1976). On the facts in *Mapp,* see Corinna B. Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1375–76 (2004).

56 Davis v. United States, 131 S. Ct. 2419, 2427 (2011).

57 *See Wolf*, 338 U.S. at 31 (noting the availability of "remedies of private action" in states that had not voluntarily adopted an exclusionary rule).

58 Olmstead v. United States, 277 U.S. 438, 462–63 (1928).

59 *Id.* at 462.

sibility of evidence, in conflict with prior law of evidence, and despite no constitutional text requiring an evidentiary remedy.

To be sure, the dramatic extension of the exclusionary rule to the states in *Mapp* was just the beginning of the story and not the end. In the decades since, the Supreme Court has created a range of exceptions to the exclusionary rule; recent rulings cite to exceptions involving good faith mistakes by police and emphasize as paramount concerns with excluding reliable evidence of guilt.[60] The next Part will take up the reasons why the Court has backtracked from or moderated the impact of its decisions on evidentiary outcomes, depending on one's point of view, to use constitutional exclusionary rules to displace evidence rules. Those rulings help to fill out the picture in a way that the initially binary story described in this Part (either the constitutional rule trumps or it does not) fails to capture.

3. *Punitive Damages*

One might respond to the prior examples with the concern that perhaps the exclusionary rule is something of an exception, but that in general the Supreme Court might tend to be more willing to regulate evidence law in the context of constitutional rights that are more explicitly, based on their text, evidence focused (like the Confrontation Clause, or like Fifth Amendment privilege, discussed next). However, a range of due process rulings have taken the same form explicitly regulating evidence law, even though the due process clause has language that could not be more general or susceptible to varied applications. To be sure, the phrase "due process of law" clearly refers to deprivations that are the result of a judicial process. However, the text does not necessarily require an evidentiary remedy to any such deprivation of life, liberty, or property through constitutionally inadequate judicial process. In rulings discussed in the next Part, the Court has noted that it disfavors over-regulation of evidence law using the Due Process Clause, particularly in criminal cases. In general, as Professor Alex Stein has described well, only "in extreme cases" in which there is some "fundamental unfairness" does the Court inter-

60 Herring v. United States, 555 U.S. 135, 137 (2009). The majority in *Herring* rejected the dissent's stated concerns with potential unreliability of law enforcement databases, and instead emphasized that the mistake in the warrant was due to negligence and was an isolated error. *Id.* at 146–47.

vene.[61] And yet in civil litigation, the Court's approach has sometimes been quite different.

In early rulings concerning punitive damages verdicts, the Court expressed great concern with the problem of excessive and arbitrarily imposed punitive damages awards. However, in those early rulings, the Court deferred to state judges' instructions to jurors, approving in *Pacific Mutual Life Insurance Co. v. Haslip* instructions that dissenters called "scarcely better than no guidance at all,"[62] while focusing in *BMW of North America v. Gore* on "guideposts" to assess on appeal whether punitive damages awards were excessive.[63] The Court was not attempting to provide guidance on evidence law, that is, how to properly instruct jurors on the standard for whether to impose punitive damages.

In more recent decisions in *State Farm v. Campbell* and *Philip Morris USA v. Williams*, the Supreme Court has more emphatically intervened in evidence law, cautioning that jurors be instructed on not punishing defendants for out-of-state conduct or conduct harming nonparty victims. As the Court put it in *Philip Morris*: "the Due Process Clause requires States to provide assurance that juries are not asking the wrong question."[64] In *Exxon Shipping v. Baker*, Justice David Souter noted that the Justices, having read examples of ill-defined state jury instructions on punitive damages, have become "skeptical that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers."[65] Justice John Paul Stevens, dissenting, asked why the Court was authorized to impose specific caps or ratios, which are "typically imposed by legislatures, not courts."[66]

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61 Stein, *supra* note 14, at 124 ("The Court therefore avoids telling state courts and legislators how to design and apply their evidence rules. Yet for extreme deviations from its vision of due process, the Court retains a residual power to interfere.").

62 499 U.S. 1, 48 (1991) (O'Connor, J., dissenting) (citations omitted).

63 517 U.S. 559, 574–75 (1996).

64 549 U.S. 346, 355 (2007). *State Farm v. Campbell*, 538 U.S. 408 (2003), provided guidance that jurors should be instructed that "out-of-state conduct" should not be used as a basis for punitive damages. *Id.* at 422. The *Philip Morris* ruling stated that it would be "standardless" and impermissible for a jury to "permit punishment for injuring a nonparty victim." *Philip Morris*, 549 U.S. at 354; *see also* Anthony J. Franze & Sheila B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, 6 U. PA. J. CONST. L. 423, 507–08 (2004); Neil Vidmar & Matthew W. Wolfe, *Fairness Through Guidance: Jury Instruction on Punitive Damages After* Philip Morris v. Williams, 2 CHARLESTON L. REV. 307, 308 (2008).

65 554 U.S. 471, 504 (2008).

66 *Id.* at 520 (Stevens, J., dissenting).

Whether the Supreme Court will continue to regulate jury instructions in this area is an open question. But one way that the Court might avoid doing what legislatures typically do to regulate damages verdicts by statute is to instead turn to evidence law: to regulate jury instructions to provide clearer guidance to jurors considering punitive damages awards in the first instance. An explicit recognition that this due process punitive damages jurisprudence involves regulation of evidence law would help to avoid the trap that the Court has seemingly fallen into, appearing to regulate punitive damages by supplying damages caps that are typically imposed by legislatures, or by applying appellate standards of review that are unfamiliar. Instead, by regulating jury instructions more carefully, the Court could use the Due Process Clause to do something that involves a more familiar role for the courts: assuring that the jury is instructed in a clear manner that reflects underlying substantive law and any constitutional limitations on that law.

4. *Fifth Amendment*

The Fifth Amendment presents a clearer textual case for a constitutional "trump" over traditional evidence law because it adopts an evidentiary privilege, with the drafters having very much in mind ensuring that individuals would not be required to testify in court in a self-incriminating way against their will. The Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself."[67] The Fourth Amendment contains no such textual suggestion of an evidentiary privilege; as the Supreme Court has put it, "[u]nlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing."[68] That text, describing an evidentiary privilege at a criminal trial, defines the right as a trump over any countervailing evidence law.

However, the Supreme Court has also supplemented the bare protection against being forced to testify at a criminal trial by explaining the consequences of that privilege. It would not be a particularly useful protection if it would simply bar forcing a person to take the stand at trial against that person's will, if a person's silence could be used to impeach them at a criminal trial, or if earlier-coerced statements during interrogations by police could substitute for testimony on the stand (unless, as

67 U.S. CONST. amend. V.

68 United States v. Patane, 542 U.S. 630, 640 (2004).

the Supreme Court has elaborated, such use is immunized).[69] A complex body of Fifth Amendment law regulates subjects that flow from the complex evidentiary situations in which the question whether a person's self-incriminating remarks may be admissible, such as, for example, the question of the voluntariness of earlier police interrogations; whether police must give warnings regarding self-incrimination rights and rights to counsel under *Miranda v. Arizona* when a suspect is in police custody;[70] rules to evaluate the voluntariness of juvenile waiver;[71] the impeachment uses of post-arrest silence at subsequent proceedings;[72] and the circumstances in which individuals can refuse to testify at noncriminal proceedings where a subsequent criminal proceeding could occur.[73] The intersection of the constitutional right and the surrounding law of evidence required a more complex intervention, developing over time a body of constitutional evidence law that was an amalgam of the two.

This suggests a somewhat different understanding of the purpose and the nature of the Supreme Court's ruling in *Miranda v. Arizona*.[74] Commentators, until the Supreme Court clarified that *Miranda* was constitutionally required, had asked whether the *Miranda* warnings were subconstitutional rules, or constitutional common law, designed to protect the constitutional right but not required by the constitution and perhaps the types of rules that federal legislation could displace.[75] If so, *Miranda* would be a type of evidentiary rule generated to protect a constitutional right but one that state or federal legislators could replace with alternative mechanisms. The Supreme Court in *Dickerson v. United States,* however, held that the rule is constitutional.[76] That ruling may have settled the constitutional status of the rule but it did not explain the connection between the right against compelled self-incrimination and the warnings.

In my view, the status of the rule was always constitutional, and it was the wrong question to ask whether it was a

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69 Kastigar v. United States, 406 U.S. 441, 458 (1972).

70 384 U.S. 436, 467–71(1966).

71 J.D.B. v. North Carolina, 131 S. Ct. 2394, 2406 (2011).

72 Doyle v. Ohio, 426 U.S. 610, 618 (1976).

73 *Kastigar,* 406 U.S. at 458.

74 384 U.S. 436 (1966).

75 *See, e.g.*, Henry P. Monaghan, *The Supreme Court, 1974 Term Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 20–23 (1975) (characterizing *Miranda* as constitutional common law).

76 530 U.S. 428, 444 (2000).

remedy or a right, constitutional or subconstitutional. The rule can instead be something more straightforward: an interpretation of a constitutional right, the Fifth Amendment, which necessarily regulates evidence. After all, a constitutional right that creates a privilege in the courtroom is necessarily evidence focused, requiring a range, as described, of rules to explain its operation, during pretrial and trial practice, regarding waiver, invocation of the privilege, and remedies at trial. The notion that a courtroom privilege would be accompanied by the need to warn individuals of their privilege out of court, lest it be waived before trial, is relevant in other Fifth Amendment contexts as well. For example, the government may compel testimony from witnesses, but only if it grants those witnesses immunity or provides assurance that the witness is not a target of the investigation.[77] And in a range of contexts, the Court has held that the government need not provide warnings, but the individual seeking protection of the Fifth Amendment must timely claim the privilege.[78] Even when invoked, Fifth Amendment privilege may later be waived.[79] Similarly, individuals are notified when and whether attorney-client privilege applies, and to prevent inadvertent waiver, they may invoke the privilege in civil proceedings[80] or they may be compelled to testify in civil proceedings only if the Government provides immunity.[81] Such protections are seen as part and parcel of the self-incrimination right, since inadvertent or uninformed or even involuntary waiver might not be treated as a waiver in the courtroom: as the Court has put it, "[t]he natural concern which underlies . . . these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage."[82] Perhaps it should not be surprising that a constitutional right would require explanation in its application across a range of potential evidentiary consequences, and perhaps there should not have been any doubt as to *Miranda*'s constitutional footing.

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77 *Kastigar*, 406 U.S. at 453.

78 *See, e.g.*, Garner v. United States, 424 U.S. 648, 654 (1976) ("[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself."); Rogers v. United States, 340 U.S. 367, 370 (1951) ("If [the witness] desired the protection of the privilege against self-incrimination, she was required to claim it.").

79 Berghuis v. Thompkins, 560 U.S. 370, 382–87 (2010).

80 *See* United States v. Balsys, 524 U.S. 666, 671–72 (1998).

81 Uniformed Sanitation Men Ass'n., Inc. v. Comm'r of Sanitation, 392 U.S. 280, 282–84 (1968).

82 Michigan v. Tucker, 417 U.S. 433 at 440–41 (1974).

Some criminal procedure scholars, as opposed to constitutional scholars, have been more comfortable with the status of *Miranda* since, as Professor Susan Klein puts it well, "[c]onstitutional criminal procedure is rife with prophylactic rules."[83] Professor David Strauss more broadly describes how "ubiquit[ous]" and "necessary" prophylactic rules are throughout constitutional law when burdens of presumption or standards of review are elaborated by courts.[84] Detailed rules of operation are particularly necessary to explain how an evidentiary rule functions at each stage of the litigation process. In the area of constitutional evidence law, one would particularly expect the need for the Supreme Court to elaborate rules required to adequately protect and implement the constitutional right. That is why criminal procedure settings, such as the Fifth Amendment, are particularly "rife" with what looks like prophylactic rules only if one is not accustomed to seeing rules elaborated in the evidentiary context, in which the rule must extend to what results when waivers are not provided, when rights are not invoked during questioning, when invoked rights may later be waived, when impeachment uses are anticipated, and the like. Constitutional law necessarily looks different when it engages with evidence law, and not because it is something less than fully constitutional.

B. Evidence Law Displacing Constitutional Rights

What do we make, then, of the situations in which, despite serious reliability concerns, the Supreme Court refuses to interfere with state evidence law and permits unreliable evidence to be introduced? What if state evidence law is inadequate? More problematic, what if state evidence law is potentially inadequately protective of a constitutional right? Despite tension with a constitutional right, there are important rulings in which federal courts do not permit a constitutional right to "trump" evidence law. Some rulings have already been discussed and they preceded more recent decisions taking the

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83 Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1037 (2001); *see also* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules,* 70 U. CIN. L. REV. 1, 25 (2001) ("[T]here really isn't any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish and implement regarding every constitutional norm.").

84 David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988) ("'[P]rophylactic' rules are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law.").

opposite tack. Earlier Fourth Amendment rulings did *not* recognize an exclusionary rule where state officials violated the Fourth Amendment,[85] and earlier Confrontation Clause rulings explicitly deferred to state evidence law regarding hearsay.[86] In those areas, the Court later reconsidered its approach. In still additional areas, the Court continues to defer to state evidence law rules.

1. *State Action and* Perry v. New Hampshire

In its recent decision in *Perry v. New Hampshire,* the Supreme Court found that an eyewitness identification would not be regulated under the Due Process Clause but rather solely by any applicable state evidentiary rules.[87] In that case, the police officers had ostensibly not intended to conduct an identification procedure. Where the officers had not "arrange[d]" nor orchestrated the procedure, the Court ruled that without intentional state action, the Due Process Clause did not apply.[88] The Court noted that "potential unreliability" does not necessarily require due process regulation.[89] While the Court had in its earlier decisions focused on reliability to avoid the "automatic exclusion" of potentially "reliable and relevant" evidence to avoid the result "on occasion, in the guilty going free,"[90] where the evidence might be highly *unreliable,* in *Perry,* the Court now distanced itself from reliability-related concerns.[91] The Court noted that state evidence law could suffice to regulate any reliability problem.[92] After all, a primary aim of the due process doctrine is to deter "improper police conduct" and not simply to regulate evidence law; the "due process check for reliability" only "comes into play after the defendant establishes improper police conduct."[93] The deterrence rationale is similar to that animating more recent Fourth Amendment doctrine discussed in the next Part. In contrast, Justice Sonia Sotomayor in a solo dissent emphasized evidentiary reliability goals standing alone: the "vast body of scientific litera-

85 *See, e.g.*, Weeks v. United States 232 U.S. 383, 398 (1914) ("[T]he Fourth Amendment is not directed to individual misconduct of [state] officials.").

86 *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

87 132 S. Ct. 716, 729–30 (2012).

88 *Id.* at 725, 721.

89 *Id.* at 728.

90 *Id.* at 724 (quoting Manson v. Brathwaite, 432 U.S. 98, 112 (1977)) (internal quotation marks omitted).

91 *Id.* at 729.

92 *Id.* (noting state evidence rules, expert testimony, and jury instructions provide important "safeguards" of the reliability of eyewitness evidence).

93 *Id.* at 726.

ture" supporting the need to safeguard reliability under the Due Process Clause.[94]

In such decisions, apparently, reliability is single edged. Reliability is a reason to *limit* granting due process relief despite the presence of a constitutional violation, but reliability is not itself a reason to support a *grant* of due process relief to the potentially innocent. If reliability really means "don't ever potentially let the guilty go free," and not "improve accuracy to potentially free the innocent as well as convict the guilty," then reliability is not a particularly carefully considered concept in constitutional evidence law. The situation in which the Court defers to state evidentiary concerns extends to a broader set of due process rulings, including in areas in which not reliability but other considerations played a greater role.

2. *The Due Process Clause*

The Due Process Clause, in all of its breadth, affects a wide range of evidentiary matters in both civil and criminal trials, and there is no one constant approach toward such questions. Broadly speaking, in civil cases, procedural due process rulings safeguard some minimal ability to present evidence and confront opposing evidence, depending on the circumstances and stakes.[95] In criminal cases, due process protects a more traditional notion of fundamentally fair process. Does the right to a "day in court" include the right to present evidence, despite state evidence law to the contrary? As we have seen in a range of areas so far, the answers vary, with no general theory to address the problem.

In one line of decisions, however, the Supreme Court did try to articulate a theory for when and whether constitutional law might defer to evidence law, and that was in a particular area related to the introduction of evidence of prior convictions. In *Marshall v. Lonberger*, the defendant challenged the introduction of a prior conviction, not at sentencing but at the guilt phase of his trial.[96] The judge provided the jury with a limiting instruction to consider the evidence of the conviction only for the purpose of determining whether the conviction was valid and whether the defendant was therefore guilty of an aggra-

94 *Id.* at 738 (Sotomayor, J., dissenting).

95 *See* Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976) (modifying test to focus on balancing the costs and benefits of procedure); Goldberg v. Kelly, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

96 459 U.S. 422, 426 (1983).

vated offense.[97] The defendant argued that because he had unintelligently waived his right to trial in the previous case, the conviction was invalid, and its introduction at trial violated his due process rights.[98] In upholding the defendant's conviction, the Court reaffirmed its decision in *Spencer v. Texas,* which rejected the claim that the Due Process Clause should bar the introduction of prior convictions under a state habitual offender statute. The "[state] procedural rules [in *Spencer*] permitting introduction of the defendant's prior conviction did not pose a sufficient danger of unfairness to the defendant to offend the Due Process Clause," the *Lonberger* Court explained, "in part because such evidence was accompanied by instructions limiting the jury's use of the conviction to sentence enhancement."[99] More broadly, as the Court put it, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."[100]

Under the approach adopted in *Spencer*, the Supreme Court sought to avoid the need to "make inroads into this entire complex code of state criminal evidentiary law"[101] unless the state law ran directly afoul of a constitutional right. The Court also noted that a more "specific" constitutional right violation might result in a different outcome; for example, if the Fifth Amendment privilege against self-incrimination was implicated, the result might be different.[102] Or, an unconstitutional prior conviction (for example, a conviction of a crime itself declared unconstitutional) would raise very different issues of greater constitutional concern, the Court implied.[103]

Those rulings suggest a different principle for adjudicating these conflicts: the collision between constitutional law and evidence law must be more direct and "specific." That set of statements, while it could support a coherent "test" for deciding whether a constitutional right should displace evidence law or not, has not been clearly followed in other areas. As dis-

97 *Id.* at 429.
98 *Id.*
99 *Id.* at 438 n.6.
100 *Id.*
101 Spencer v. Texas, 385 U.S. 554, 562 (1967).
102 *See id.* at 564–65 ("[In contrast to this case,] the emphasis [in *Jackson v. Denno*, which invalidated a state law requiring juries to decide the voluntariness of confessions,] was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury." (citing Jackson v. Denno, 378 U.S. 368 (1965))).
103 *Lonberger*, 459 U.S. at 438 & n.6.

cussed already, the Court has in the decades since equivocated on how to approach such matters within rights and has not adopted any test to resolve questions across different types of constitutional rights. Further, as discussed in the next section, still other considerations animate the Supreme Court's rulings in this intersection between constitutional law and evidence law: (1) federalism, (2) finality, (3) institutional competence, (4) seriousness of the constitutional violation, (5) deterrence, and (6) reliability. And these are just particularly salient values emphasized in the various constitutional settings; different constitutional rights and evidence rules may implicate still additional concerns. I will argue in Parts II and III that such additional values should inform the calculus; the question whether and how a constitutional right should affect evidence law cannot be reduced to a question regarding the specificity of the constitutional right. Certainly, some constitutional rights do not directly relate to trial litigation; they may themselves be litigated at trial, but they do not regulate the fairness or procedures used at trial. However, the specificity of a constitutional right's text, while it may provide a starting place, does not answer the question how that text should affect outcomes in relation to evidence-law rules. I will argue that the intersection should require more complex consideration.

C. Concerns with Regulating Evidence Law

1. *Federalism, Finality, and Institutional Competence*

In general, the Supreme Court's due process rulings are restrained and avoid engaging with questions of the reliability of trial evidence. The Court often repeats language along the lines of what it said in *Spencer v. Texas* that: "It has never been thought that [decisions under the Due Process Clause] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure."[104] Noting that the Court shared similar concerns as were expressed in *Michelson*, the Court added in *Spencer*, "To say the United States Constitution is infringed simply because this type of evidence may be prejudicial and limiting instructions inadequate to vitiate prejudicial effects, would make inroads into this entire complex code of state criminal evidentiary law, and would threaten other large areas of trial jurisprudence."[105] One reason is institutional competence. Evidence law may be developed over time by trial

104 *Id.* at 438 n.6 (quoting *Spencer*, 385 U.S. at 564) (alteration in original).
105 *Spencer*, 385 U.S. at 562.

judges with experience in such matters. A related reason is federalism, however, where evidence rules may reflect policy preferences of states. In a range of contexts, as noted, the Court has avoided extending the application of due process analysis, noting that state evidence law should instead apply.[106] Citing to *Spencer*, the Court in *Marshall v. Lonberger* further explained, "[T]he Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules."[107]

Developing the theme still further in *Montana v. Egelhoff*, the Supreme Court noted that in criminal procedure, due to federalism concerns, a state evidentiary rule (there a rule barring jury consideration of voluntary intoxication) must be examined based on whether it violates a "fundamental principle of justice" by examining "historical practice" and the "common-law tradition" in place at the time that the Fourteenth Amendment was adopted, as well noting the lack of any newly established practice "sufficiently uniform and permanent" to be deemed as fundamental.[108]

In addition to federalism, finality has long been one important reason for this tendency to value procedural compliance over reliability in interpretation of constitutional criminal procedure rights. Issues of finality do not come into play at trial, but regarding the question whether evidentiary lapses should result in a do-over of that trial. The Supreme Court has long emphasized, "[T]he trial is the paramount event for determining

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106 *See, e.g.*, Perry v. New Hampshire, 132 S. Ct. 716, 729 (2012) (noting that state evidence rules, expert testimony, and jury instructions provide important "safeguards" of the reliability of eyewitness evidence). In addition, the Due Process Clause ensures a "beyond a reasonable doubt" standard of proof at a criminal trial. *In re* Winship, 397 U.S. 358, 364 (1970). However, the due process standard for review of sufficiency of evidence after a conviction is quite deferential, with the evidence viewed in the light most favorable to the prosecution, and reversals are rare. *See* Jackson v. Virginia, 443 U.S. 307, 319, 326 (1979) (describing how a reviewing court "faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution").

107 *Lonberger*, 459 U.S. at 438 n.6.

108 518 U.S. 37, 43, 46, 51 (1996); *see also* Estelle v. McGuire, 502 U.S. 62, 72 (1991) ("[O]ur habeas powers [do not] allow us to reverse McGuire's conviction [under the Due Process Clause] based on a belief that the trial judge incorrectly interpreted the California Evidence Code."); Rock v. Arkansas, 483 U.S. 44, 64–65 (1987) (Rehnquist, C.J., dissenting) ("The Constitution does not in any way relieve a defendant from compliance with 'rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973))).

the guilt or innocence of the defendant."[109] In part for reasons of finality of criminal judgments, the Court has yet to recognize a claim of "actual innocence" under the Due Process Clause, only hypothetically assuming that a capital convict facing execution might raise such a claim based on some type of extremely persuasive showing.[110] The Court declined to recognize a freestanding due process right to obtain post-conviction DNA testing, a type of discovery that could improve accuracy, as the Court acknowledged, preferring to defer to state experimentation with legislation in the area, and avoiding addressing evidentiary issues such as when access to such evidence might be required, when preservation of evidence would be required, and under what circumstances.[111]

In contrast, the Supreme Court has developed a range of increasingly ornate doctrines, including harmless error rules and prejudice requirements, that encourage if not permit federal judges to deny federal habeas relief to those perceived to be reliably guilty, or at least where error is seen as insignificant in light of the untainted evidence in the case.[112] Federalizing harmless error as a constitutional matter, and then adopting less rights-protective harmless error rules for federal habeas corpus all constituted another intervention into evidence law of a different type: the standards for reviewing evidence on appeal and post-conviction. The purpose of preserving finality, and not reopening trials due to "minor" evidentiary or even consti-

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109 Herrera v. Collins, 506 U.S. 390, 416 (1993).

110 *Id.* at 398, 417; *see also* Nicholas Berg, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 135–37 (2005) (listing lower-court cases taking different positions on *Herrera*); Brandon L. Garrett, *Judging Innocence,* 108 COLUM. L. REV. 55, 110–12 (2008) (noting that, in an empirical study of 133 convicts who were later exonerated by DNA evidence, five had asserted actual innocence claims under *Herrera*, and none were granted relief).

111 Dist. Attorney's Office v. Osborne, 557 U.S. 52, 55 (2009) (acknowledging that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty" but expressing reluctance to "take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner"); *see also* Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2925–35 (2010) (discussing the *Osborne* decision in detail).

112 *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993) (ruling that the harmless error standard to be used during federal habeas corpus review would be a more deferential "prejudice" test); *see also* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1692–98 (2008) (discussing how the availability of DNA evidence should impact federal habeas review). In some areas, in contrast, the Court has found limiting instructions inadequate to protect against constitutional violations. *See, e.g.*, Bruton v. United States, 391 U.S. 123, 162 (1968).

tutional violations, may also explain reluctance to over-regulate evidence.

2. *Deterrence and Seriousness of the Rights Violation*

The exclusionary rule, as discussed in the next Part, has been substantially limited in a complex mass of rulings due to a Supreme Court concern that officers need not be over-deterred, including when they "acted in good faith" when, for example, relying on a search warrant.[113] The *Perry* ruling provides another example, adopting a deterrence rationale in not regulating lineups absent "improper conduct" by police. The case of destruction of evidence is a similar example of this approach, relying on notions of fault to prevent undue interference with law enforcement officers. In *Arizona v. Youngblood*, the Court held that even reckless destruction of evidence does not violate due process or require an adverse evidentiary inference against the state.[114] Only intentional destruction of evidence would do: fault was the trigger for interference with traditional rules of evidence.[115]

In other circumstances, it is a weighing of the totality of the evidence in a case that triggers a constitutional concern and makes an intervention in evidence law justified. The constitutional violation must be sufficiently "serious" to justify upsetting the standard operation of state evidence rules. The Supreme Court forbids a state to deny funding for experts to an indigent defendant, but only if the expert would testify as to a sufficiently "significant" aspect of the defense case, adopting a cost-benefit analysis from *Mathews v. Eldridge*.[116] Other cases like *Chambers v. Mississippi*, in which the Court found that a "mechanistic[ ]" application of the hearsay rule fundamentally impaired the defense,[117] and *Crane v. Kentucky*, in which evidence of the circumstances of a confession were excluded, are examples of rulings where the Court found due process violated where evidence "central to the defendant's claim of innocence" was excluded at trial.[118] But in general, as Professor

113 United States. v. Leon, 468 U.S. 897, 922 (1984) (citations omitted).

114 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

115 *Id.*

116 Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985).

117 Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

118 Crane v. Kentucky, 476 U.S. 683, 690 (1986).

Alex Stein has noted, constitutional law tends to supplant evidence law only "in extreme cases" that exhibit "fundamental unfairness" implicating the Due Process Clause (or other constitutional provisions).[119] As the Court has put it, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."[120]

3. *Reliability*

As critics of this aspect of the Supreme Court's criminal procedure jurisprudence have pointed out, myself included, accuracy and reliability concerns are not of primary importance in constitutional criminal procedure generally.[121] Fair trial jurisprudence more heavily relies upon tradition-bound due process notions of "fundamental fairness." Few criminal procedure rights attempt to ensure that the jury hears accurate and reliable evidence; they chiefly focus on deterring constitutional violations by state actors, or they aim to prevent extreme unfairness or arbitrariness. In contrast, although rules of evidence generally favor admissibility absent some rule, statute or constitutional right barring admission, reliability is a central concern in the law of evidence.[122]

As a result, it has been state courts that have primarily, for example, responded to accuracy concerns in criminal cases raised by DNA exonerations and wrongful convictions, to adopt

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119 Stein, *supra* note 14, at 66; *see also id.* at 124 ("The Court therefore avoids telling state courts and legislators how to design and apply their evidence rules. Yet for extreme deviations from its vision of due process, the Court retains a residual power to interfere.").

120 Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

121 *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 7–8 (2011); DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 16 (2012); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005); Keith A. Findley, *Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process*, 41 TEX. TECH L. REV. 133, 134, 147–72 (2008); Joseph D. Grano, Kirby, Biggers, *and* Ash*: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 MICH. L. REV., 717, 723 (1974); Dan Simon, *The Limited Diagnosticity of Criminal Trials*, 64 VAND. L. REV. 143, 146 (2011); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 818–19 (2006). For concerns cautioning against overreliance on accuracy concerns in criminal procedure, see Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609–18, 621–23 (2005).

122 *See, e.g.*, FED. R. EVID. 402, 403 (providing that relevant evidence is admissible unless federal law provides otherwise but may be excluded if it presents a danger of unfair prejudice); Sandra Guerra Thompson, Daubert *Gatekeeping for Eyewitness Identifications*, 65 S.M.U. L. REV. 593, 601–16 (2012) (discussing reliability in the context of eyewitness identifications).

a range of accuracy related reforms to criminal procedure and evidentiary rules.[123] Perhaps that reflects the greater ability of state courts to respond to evidentiary concerns and reliability concerns, and the relatively restrained and procedural focus of due process jurisprudence. Or it may simply reflect the changing approach of the Supreme Court towards procedural due process rights, with a far greater emphasis (in criminal cases, not civil cases) on costs of over-deterring officials, and an emphasis on admitting evidence, with a far greater reluctance than during the Warren Court years to recognize new procedural or substantive due process rights that might bar admissibility of evidence in criminal cases.

II
HARMONIZING CONSTITUTIONAL LAW AND EVIDENCE LAW

The choice between interpreting the constitution to exclude otherwise admissible evidence or deferring to evidence law is not as binary as the first Part has suggested. In key areas in which the Supreme Court seemed to declare the constitution a "trump" over evidence law, the Court later moderated (and some feared eviscerated) the impact of its early rulings by engaging with evidence-law concerns, or engaging with limiting principles drawn from constitutional sources. I will develop in this Part how it may be preferable to harmonize constitutional law and evidence law by relying on common principles, rather than principles relevant in one area but irrelevant in the other. Rather than viewing constitutional law as an occasional trump over extreme unfairness in application of evidence law, constitutional law, I argue, is more often than appreciated, necessarily entwined with evidence law. Indeed, an understanding of the relationship between constitutional law and evidence law can help to better appreciate several difficult problem in constitutional theory, including the status of the exclusionary rule and the *Miranda* warnings, and it can point the way to an improved jurisprudence of constitutional evidence law, which is the subject of Part III of this Article.

A. Tempering Constitutional Evidence Law

1. *Exclusionary Rule Exceptionalism*

The Supreme Court's *Mapp* opinion appeared to announce an expansive rule that: "[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same au-

123 For an overview, see GARRETT, *supra* note 121, at ch. 9.

thority, inadmissible in a state court."[124] Such a strict constitutional rule, trumping the use of otherwise admissible evidence, would not be maintained by the Supreme Court, which has "long since rejected that approach."[125] In the decades since *Mapp* was decided, the Supreme Court has emphasized that the Fourth Amendment exclusionary rule has a "deterrence rationale."[126] The Court now highlights how while the rule was intended to remedy and deter police misconduct, that remedy is a "last resort."[127] Where the particular goal of encouraging police to exercise a "greater degree of care" is not met, then the rule should not apply, due to its "substantial social costs."[128] The Court has emphasized, as noted, that unlike the Fifth Amendment, "[t]he Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands."[129] In *U.S. v. Leon*, for example, the Supreme Court explained that whether "the exclusionary sanction is appropriately imposed" is "an issue separate" from whether the Fourth Amendment was violated (and there the Court adopted an exception where police relied upon a search warrant in "good faith").[130] A welter of exceptions to the exclusionary rule have been recognized.

The method the Supreme Court adopted in these rulings could be seen as a form of cost-benefit balancing, asking whether the interest in deterrence outweighs the "substantial social costs" of excluding evidence of guilt.[131] What is particularly important for these purposes, however, is that this Fourth Amendment balancing does not focus on the reliability of the particular piece of evidence in question (which a court might weight when deciding whether to admit a piece of evidence

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124 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

125 Hudson v. Michigan, 547 U.S. 586, 591 (2006).

126 United States v. Peltier, 422 U.S. 531, 536–39 (1975).

127 *Hudson*, 547 U.S. at 591.

128 United States v. Leon, 468 U.S. 897, 907 (1984); Michigan v. Tucker, 417 U.S. 433, 447 (1974).

129 *Leon*, 468 U.S. at 906.

130 *Id.* at 906–08. For a sampling of criticism and defenses of the decision, see Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 907 (1986) (arguing that *Leon*'s result is correct but that the Court's reasoning is wrong); Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1422–23 (1986) (arguing that *Leon* played a role in "gutting the Fourth Amendment"); Wayne R. LaFave, *"The Seductive Call of Expediency":* United States v. Leon*, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 908 (1984) (arguing that *Leon* insulates decisions to issue warrants from judicial review); Sean R. O'Brien, Note, United States v. Leon *and the Freezing of the Fourth Amendment*, 68 N.Y.U. L. REV. 1305, 1307 (1993) (arguing that *Leon* has not "choke[d] off the development of Fourth amendment law").

131 *Leon*, 468 U.S. at 907–08.

under a rule like Federal Rule of Evidence 403). Rather, the balancing occurs at a more general and abstract level, focusing on notions of fault and whether there is a need to deter police who acted intentionally, or whether police (or other officers[132]) instead "acted in objective good faith or their transgressions have been minor."[133] Therefore, the Court has balanced the right to privacy and the interest in deterring constitutional violations by officers as against the cost of excluding reliable evidence of guilt in criminal cases, resulting in the consequence "that some guilty defendants may go free or received reduced sentences."[134] Whether that balance is empirically informed is another question; dissenting in *Leon,* Justice Brennan argued that recent studies, including by the General Accounting Office (GAO), "have demonstrated that federal and state prosecutors very rarely drop cases because of potential search and seizure problems"; the majority countered that "[n]o empirical researcher, proponent or opponent of the rule, has yet been able to establish with any assurance whether the rule has a deterrent effect."[135]

Thus, the result is a set of exceptions that seek to accomplish a general evidentiary goal—admissibility of reliable evidence of guilt—but the exceptions themselves are motivated by concepts of law enforcement effectiveness and fault, i.e., was this "flagrant" misconduct, or would reasonable officers have been on notice that their conduct clearly violated the Fourth Amendment.[136] The Court has created exceptions for evidentiary uses seen as less directly related to deterring police, such as for impeachment uses of evidence obtained in violation of the Fourth Amendment.[137] Since officers cannot be deterred lacking notice that their conduct would violate the Fourth Amendment, the Court has not extended the exclusionary rule retroactively where new Fourth Amendment decisions are announced, or whether a criminal statute was later declared un-

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132 *See* Arizona v. Evans, 514 U.S. 1, 15–16 (1995) (holding that exclusion of evidence based on the errors of court employees was not justified under *Leon*).

133 *Leon*, 468 U.S. at 908.

134 *Id.* at 907.

135 *Id.* at 950 (Brennan, J., dissenting); *id.* at 918 (quoting United States v. Janis, 428 U.S. 433, 450 n.22 (1976)); *see also* Yale Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 600 (1983) (suggesting that the relevant "'cost-benefit analysis' [was arguably] worked out when the [F]ourth [A]mendment was written").

136 *See* Herring v. United States, 555 U.S. 135, 144 (2009).

137 *See* United States v. Havens, 446 U.S. 620, 628 (1980); Oregon v. Hass, 420 U.S. 714, 723–24 (1975).

constitutional.[138] Good-faith exceptions have been recognized for police negligence in securing a warrant and good faith reliance on a warrant[139]; most recently, in *Herring v. United States*, the Supreme Court recognized a "good faith" exception to the exclusionary rule where a bookkeeping error resulted in the arrest warrant.[140] Critics of these decisions have feared the erosion if not the outright demise of the exclusionary rule.[141]

What is most important for these purposes, however, is that the Supreme Court's focus is not on just reconciling constitutional law with evidence law but with minimizing the impact of constitutional law on the otherwise-admissibility of this evidence. The exclusionary rule case law is far from a model for how to accommodate constitutional law to evidence law. The stated goal is not to harmonize the underlying *purposes* of the constitutional rule with that of any evidentiary rules. The goal is to promote a different set of policy interests: the interests of law enforcement. Thus, in *Hudson v. Michigan*, Justice Scalia emphasized not just the "substantial social costs" of strictly applying the rule but also matters totally outside of evidence law, such as nonevidentiary deterrents now available, including the possibility of bringing a civil rights suit to deter police misconduct.[142]

That said, there is some overlap with background principles in evidence law. The default position in codes of evidence, such as the Federal Rules of Evidence, is that relevant evidence will typically be admissible unless the U.S. Constitution or federal law or evidence-law sources state otherwise.[143] Narrowly interpreting rules of exclusion certainly is compatible with a view that evidence law should typically permit admissibility of

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138 *See* Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979) (admitting evidence collected pursuant to a lawful search motivated by probable cause that suspected had violated a statute held later to be unconstitutional); United States v. Peltier, 422 U.S. 531, 542 (1975) (admitting evidence whose collection, although lawful at the time it was obtained, would violate the Fourth Amendment under current doctrine).

139 *See Leon*, 468 U.S. at 922–23 (admitting evidence collected in a search pursuant to a warrant but found at trial to be unsupported by probable cause); Franks v. Delaware, 438 U.S. 154, 155–56 (1978) (holding that a search is unlawful if conducted pursuant to a warrant obtained by knowingly or recklessly making false statements to a magistrate).

140 555 U.S. 135, 137 (2009).

141 *See* Jeffrey L. Fisher, *Reclaiming Criminal Procedure*, 38 GEO L.J. ANN. REV. CRIM. PROC. xv (2009); Wayne R. LaFave, *Recent Development: The Smell of* Herring*: A Critique of the Supreme Court's Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758 (2009).

142 Hudson v. Michigan, 547 U.S. 586, 594–99 (2006).

143 *See* FED. R. EVID. 402.

evidence that is reliable. On the latter point, however, only occasionally in its Fourth Amendment cases has the Supreme Court cited to concerns more directly grounded in the reliability of evidence. In *United States v. White*, for example, the Court ruled that it was not error to admit audio evidence of conversation with an informant, citing a reluctance to create "constitutional barriers to relevant and probative evidence which is also accurate and reliable," contrasted with the "unaided memory of a police agent."[144] Such rulings are not the norm in the Fourth Amendment area. The Court has not embraced evidence-law goals but has instead reduced the potential breadth of the exclusionary rule, and in doing so it rejected "[r]esort to the massive remedy of suppressing evidence of guilt."[145] The Court has sought to prevent exclusion of evidence of guilt, regardless of its reliability.

2. *Post*-Crawford *Embrace of Evidence Law*

The *Crawford* revolution in Confrontation Clause jurisprudence has also been tempered in its impact, but not with reference to purely "deterrence" or law enforcement-related interests in admitting evidence of guilt. Rather, the Supreme Court and lower federal courts have engaged somewhat more than in the Fourth Amendment context with institutional considerations that are also important to the structure of evidence-law rules. The *Crawford* Court's rejection of an evidence-law-accommodating framework, citing to the history of the Sixth Amendment's protection, left a host of questions about how the new concepts, most fundamentally whether a statement was "testimonial," would be defined and how they interacted with existing evidence-law concepts.[146] If a document contains a statement that is "testimonial," how does that relate to tradi-

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144 401 U.S. 745, 753 (1971).

145 *Hudson*, 547 U.S. at 599.

146 *See generally* Jeffrey Bellin, *The Incredible Shrinking Confrontation Clause*, 92 B.U. L. REV. 1865, 1893–1904 (2012) (suggesting that the Confrontation Clause also limits the admission of nontestimonial hearsay); *see also* Davis v. Washington, 547 U.S. 813, 821 (2006) (finding that a victim's statements identifying a defendant to a 911 operator not testimonial, but that those in the victim's affidavit to the police were). Regarding the immediate reaction to *Crawford* in domestic violence cases, and how trial judges narrowly interpreted the decision, see generally David Jaros, *The Lessons of* People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting* Crawford v. Washington, 42 AM. CRIM. L. REV. 995, 1000–08 (2005).

tional business record exceptions to the hearsay rule?[147] How about the reports of expert witnesses?

Perhaps the Supreme Court could have adhered to a strict view of *Crawford*, as Justice Antonin Scalia would prefer, regardless of the potential practical consequences. But merely citing to the original meaning of the Confrontation Clause and common-law rules on out-of-court testimony has provided scant guidance for how to resolve the myriad applications of the rule in a modern setting, including the work of forensic analysts in crime labs. As a result, the Justices have continued to grapple with the problem and hear new cases raising different fact patterns concerning the question whether different types of excited utterances or expert evidence raise Confrontation Clause concerns under its new "testimonial" evidence test.[148]

Dissenters in *Melendez-Diaz v. Massachusetts* sought to distinguish expert witnesses as different from other "ordinary" types of witnesses and argued that Confrontation Clause doctrine should reflect the distinct treatment of expert witnesses in evidence law.[149] Indeed, having disclaimed a reliability-centered approach in *Crawford*, Justice Scalia writing in *Melendez-Diaz* noted that cross-examination does have the secondary benefit that it can serve reliability goals, and noted real flaws in forensic testimony, stating: "Forensic evidence is not uniquely immune from the risk of manipulation."[150] Justice Scalia added, "A forensic analyst responding to a request from a law enforcement official may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[151]

More recently, in *Williams v. Illinois*, the plurality opinion relied on the fact that "settled evidence law" reflected in federal and state evidence-law rules permitted the forensic expert to opine on DNA testing conducted by an analyst from a different crime lab, where not disclosed for the truth of that underlying

147 *See, e.g.*, Fed. R. Evid. 803(6) (recognizing hearsay exception for records of regularly conducted activity of a business).

148 *See, e.g.*, Williams v. Illinois, 132 S. Ct. 2221 (2012) (finding no Confrontation Clause violation where a trial court allowed a lab analyst to testify that a DNA profile generated by a forensic test performed by another analyst matched a defendant's DNA profile already on file with the police); Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) (finding testimony by lab analyst who did not conduct blood alcohol report to be adequate); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2009) (finding that formal forensic reports are testimonial).

149 *Melendez-Diaz*, 557 U.S. at 330–31 (Kennedy, J,, dissenting).

150 *Id.* at 318.

151 *Id.*

information.[152] No more than a plurality agreed to that evidence-law-based approach, however, and the Justices were deeply split as to the rationale that explained the result in the case. In *Williams*, Justice Clarence Thomas concurred, but countered, "I do not think that rules of evidence should so easily trump a defendant's confrontations right."[153] In contrast, Justice Kagan dissented, calling the result "abdication to state-law labels."[154] Meanwhile, Justice Stephen Breyer joined the opinion, creating a highly splintered result, in part relying on reliability concerns more prominent in the pre-*Crawford* cases.[155] The Justices could not agree on any consistent status to be accorded to state rules of evidence, nor how "easily" they should "trump" or what influence they should have on the question whether the constitutional right should be interpreted to avoid conflict or to simply supplant any inconsistent state-law rules. The differences no doubt reflect differences in approaches towards constitutional interpretation generally and not just differences in resolving the particular problem at hand.

Professors Jennifer Mnookin and David Kaye have carefully explored how it is particularly difficult to apply the *Crawford* rule in the area of scientific evidence, for which "courts have long been willing, sometimes to the point of absurdity, to say that information testifying experts detail to the jury in the guise of describing the basis for their conclusions is not introduced for its truth," but on the other hand, where science is collective and experts must often rely on research and evidence produced by others.[156] Indeed, as they point out, there is a real tension with rules like Federal Rule of Evidence 703, which permits experts to rely on otherwise admissible evidence such as hearsay, and with the role of an expert to educate the jury and offer analysis and conclusions not necessarily limited to "truth."[157] The resulting opinions, with deep fractures amongst the Justices, have not produced the clarity that the *Crawford* Court desired, with Justices disagreeing about

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152 132 S. Ct. 2221, 2228 (2012) (plurality opinion).

153 *Id.* at 2256 (Thomas, J., concurring).

154 *Id.* at 2272 (Kagan, J., dissenting).

155 *Id.* (Breyer, J., concurring) ("The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant." (citing Maryland v. Craig, 497 U.S. 836, 845 (1990))).

156 Jennifer Mnookin & David Kaye, *Confronting Science: Expert Evidence and the Confrontation Clause*, 2012 SUP. CT. REV. 99, 101 (2012); *see also id.* at 149 ("[I]t seems to us that the most important feature of science is that *it is a collective, rather than an individual enterprise*.").

157 *Id.* at 120, 139–40.

whether the purposes of statements, such as expert affidavits, count as "testimonial."[158]

Whether a coherent body of law extending the *Crawford* Confrontation Clause test to the area of expert evidence can emerge very much remains to be seen.[159] Perhaps the Court should admit that its analysis is no longer, if it ever was, firmly grounded in some kind of originalist interpretation of the Confrontation Clause, but now, as Professor Sklansky has explored, "fairness and accuracy matter, too," and the Court should admit that "present-day practicalities" matter as well.[160] For these purposes, I merely want to underscore that declaring a clean break from evidence law was not nearly as easy as it seemed in *Crawford*, at least for the group of Justices concerned with the practical impact of the constitutional ruling on the administration of criminal law and on litigation. Traditional evidentiary concerns, including reliability concerns, concerns of practicality and convenience, and the roles and nature of distinct types of witnesses like expert witnesses, may all continue to play a greater role as the Confrontation Clause jurisprudence develops. I view that as a good thing, a type of analysis that should be made explicit, and certainly preferable to the type of weight placed balancing of highly generalized interests in deterrence in the Fourth Amendment context. More fine-grained balancing that focuses on the type of evidence, its reliability, and how it is produced, may produce far better results.

3. *Supplementing Evidence Law*

In the area of eyewitness identification evidence, discussed briefly in the last Part in reference to the *Perry* decision, the Supreme Court amalgamated constitutional law with evidence

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158 For scholarly criticisms, see, e.g., Deborah Ahrens & John Mitchell, *Don't Blame* Crawford *or* Bryant*, The Mess is all* Davis*'s Fault*, 39 RUTGERS L. REC. 104, 105 (2012) (characterizing "Confrontation Clause jurisprudence" as "a mess"); Dylan O. Keenan, *Confronting* Crawford v. Washington *in the Lower Courts*, 122 YALE L.J. 782, 785 (2012) (noting that "scholars generally agree that *Crawford's* stated doctrine is vague and that lower courts have struggled to apply it"); Josephine Ross, *After* Crawford *Double-Speak: "Testimony" Does Not Mean Testimony and "Witness" Does Not Mean Witness*, 97 J. CRIM. L. & CRIMINOLOGY 147, 148 (2006) ("*Crawford v. Washington* created a wave of uncertainty regarding the significance of the newly defined Confrontation Clause.").

159 Professors Mnookin and Kaye suggest compromises that fulfill Confrontation Clause values while taking into account that "science is a collective phenomenon," including by permitting surrogate expert witnesses in narrow circumstances and relying on adequate documentation. Mnookin & Kaye, *supra* note 156, at 155.

160 Sklansky, *supra* note 49, at 515–16.

law in a quite unique and surprising way. In its earliest 1960s decisions, the Court had ruled that the Due Process Clause forbade the introduction of unnecessarily suggestive identification techniques.[161] Then, dissatisfied with the rigidity of that "*per se*" approach, the Court in *Manson v. Brathwaite* in 1977 altered the framework by adopting a "reliability" test, designed to excuse improper police conduct that violated the constitution by offering trial judges a series of factors to apply when deciding whether to exclude the evidence at trial.[162] The factors examine the following: (1) the eyewitness's opportunity to view the culprit at the time of the crime; (2) the eyewitness's degree of attention when viewing the culprit; (3) the accuracy of the description the eyewitness provides to the police of the culprit; (4) the eyewitness's level of certainty at the time of the identification procedure; and (5) the length of time that had elapsed between the crime and the identification procedure in question.[163]

Those so-called "reliability" factors were not drawn from scientific research but rather were distilled from prior judicial rulings.[164] The factors are highly problematic, and as a 2014 report by the National Research Council of the National Academies of Science describes in some detail, subsequent decades of fairly intensive scientific and social science research has shown these factors do not correspond to the reliability of an eyewitness identification.[165] Similar rules have also been adopted in the Sixth Amendment context, limiting the right under *United States v. Wade* to have counsel present at a post-indictment live lineup, should there be "independent" evidence of reliability of the identification.[166]

The Supreme Court's attempt, whether justified or not (and I have criticized the ruling as poorly conceived and in need of

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161 *See* Stovall v. Denno, 388 U.S. 293, 295–96 (1967).

162 432 U.S. 98, 114 (1977).

163 *Id.*

164 *Id.*

165 *See* NATIONAL RESEARCH COUNCIL REPORT, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION 31 (2014) (I note that I served on the committee that produced that report); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 453 (2012); Gary L. Wells & Amy L. Bradfield, *"Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience*, 83 J. APPLIED PSYCHOL. 360, 361 (1998); Gary L. Wells & Deah S. Quinlivan, *Suggestive Eyewitness Identification Procedures and the Supreme Court's Reliability Test in Light of Eyewitness Science: 30 Years Later*, 33 L. & HUM. BEHAV. 1, 9–14 (2009).

166 United States v. Wade, 388 U.S. 218, 242 (1967); Gilbert v. California, 388 U.S. 263, 272 (1967).

an overhaul in light of subsequent scientific research),[167] did constitute a judicial effort to blunt the impact of a due process rule permitting the exclusion of eyewitness evidence, by adding an overlay permitting the consideration of a range of traditional evidentiary factors that might otherwise be considered by balancing prejudice and probative impact of evidence under rules like Federal Rule of Evidence 403. Constitutional law was supplemented with a rule reflecting a traditional rule of evidence. Moreover, this is an area in which the Due Process Clause shared an underlying concern with the reliability of evidence along with rules like Rule 403. The result may have been poorly constructed, and the rule, in my view, should be almost entirely scrapped. Indeed, explicit reliance on Rule 403 rather than a court-made set of factors might have left trial judges more room to update the analysis as scientific research on eyewitness memory progressed. However, the *Manson v. Brathwaite* test was a notable effort in one respect: evidentiary concerns were themselves incorporated into a constitutional test. The unfortunate result provides a cautionary tale as to the dangers of engaging in such constitutional interpretation and then failing to revisit the results as evidence law changes or as scientific research advances.

B. Ambiguous Evidence Law

In some areas, traditional evidence rules may themselves have been highly uncertain or confused, making it unclear whether a constitutional right would have any problematic impact on evidence outcomes, and making any concern with a conflict far less great. On the admissibility of prior convictions, the Supreme Court emphasized that the common law was "far more ambivalent" than often supposed and that "the common law developed broad, vaguely defined exceptions—such as proof of intent, identity, malice, motive, and plan—whose application is left largely to the discretion of the trial judge."[168] As a result, the Court approved a federal due process rule that "where a defendant's prior conviction is unconstitutional or unreliable, it may not be introduced in evidence against that defendant for any purpose."[169] Evidence law was not rejected nor incorporated; it was itself sufficiently unclear that the constitutional rule was compatible with the state of evidence law.

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167 *See* Garrett, *supra* note 165, at 453.

168 Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983).

169 *Id.*

1. *Voluntariness of Confessions*

The law of confessions is another area in which the Supreme Court has assumed that prejudice will generally be so powerful that evidence rules short of excluding confession evidence entirely will not suffice to protect against the dangers that the constitutional rights seek to protect. Yet, contradictorily, it is also an area in which the Court has disavowed any rule to ensure reliability of evidence, leaving that task to state evidence law. The Court's earlier decisions regulating confessions, such as *Jackson v. Denno*, strongly emphasized longstanding concern with the unreliability of coerced confession evidence, noting that the Fifth Amendment was concerned with both "the probable unreliability of confessions" but also the "complex of values" served by insisting that the government not "wring[ ] a confession out of an accused against his will."[170] In *Jackson v. Denno,* the Court additionally ruled that involuntary confessions cannot be admitted at trial.[171] In *Bruton v. United States,* the Court found it impermissible to allow the incriminating statements of a codefendant to be admitted in a joint trial due to the potential for prejudice.[172] However, in the decades since, the Court has disclaimed constitutional regulation of reliability of confessions. In *Colorado v. Connelley,* for example, a schizophrenic defendant thought he was hearing the "voice of God" during his interrogation, but the Court found no "essential link" between coercion by the State and the confession that resulted.[173] Any review of this highly problematic confession, which "might be proved to be quite unreliable," the Court admitted, would be "a matter to be governed by the evidentiary laws of the forum . . . not by the Due Process Clause of the Fourteenth Amendment."[174]

Yet one explanation for this result is that traditional evidence-law rules required very little by way of corroboration of

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170 378 U.S. 368, 386 (1964) (quoting Blackburn v. Alabama, 361 U.S. 199, 206–07 (1960)); *see also* Brown v. Mississippi, 297 U.S. 278, 282 (1936) (describing for example, how two defendants "confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers"). For a detailed discussion of those earlier rulings, see Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 492–99 (2006).

171 378 U.S. 368, 388–91 (1964).

172 391 U.S. 123, 126 (1968).

173 479 U.S. 157, 161, 165 (1986).

174 *Id.* at 167.

confession evidence.[175] The Supreme Court was not avoiding interference with evidence law that had much of an established practice of careful reliability review of confession evidence, but rather the Court was operating on a fairly clean slate. The suggestion that state evidentiary rules would operate to exclude even a potentially false confession rang quite false. If anything, it was the Court's own turn towards reliability as relevant to the question of voluntariness that was then neglected in later rulings interpreting the voluntariness test as primarily if not exclusively focusing on official coercion and not reliability.[176]

2. Miranda *Exceptionalism*

The *Miranda* rule, unlike the voluntariness test for examining whether a confession statement can be admitted, requires that warnings be provided to inform a suspect of their privilege and rights prior to a custodial interrogation.[177] That rule has been much limited by a series of rulings over the four decades since, so much so that commentators view the rule as all but overruled.[178] As the Supreme Court has put it, these rulings have "reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming [*Miranda*]'s core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief."[179] The exceptions that the Supreme Court has recognized to the *Miranda* rule create what amounts to a detailed evidence code. They now include: a public safety exception,[180] an exception for questioning by covert or undercover officers,[181] and an exception for questioning during rou-

175 *See* Brandon L. Garrett, *Confession Contamination Revisited*, 101 VA. L. REV. 395, 410 (2015); Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051, 1110–12 (2010); Richard A. Leo et al., *supra* note 170, at 486; Richard A. Leo, Peter J. Neufeld, Steven A. Drizin & Andrew E. Taslitz, *Promoting Accuracy in the Use of Confession Evidence: An Argument for Pretrial Reliability Assessments to Prevent Wrongful Convictions*, 85 TEMP. L. REV. 759, 778–79 (2013).

176 *See* Leo et al., *supra* note 170, at 486. Some lower courts, however, have interpreted the voluntariness framework as accommodating certain reliability concerns. *See supra* Part III.

177 384 U.S. 436 (1966).

178 *See, e.g.*, Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v. Arizona*)*, 99 GEO. L.J. 1, 24 (2010) ("*Miranda* has effectively been overruled."); Yale Kamisar, *The Rise, Decline, and Fall (?) of* Miranda, 87 WASH. L. REV. 965, 984 (2012) (noting the "piece-by-piece 'overruling' of Miranda"); Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521 (2008) ("*Miranda* is largely dead.").

179 United States v. Patane, 542 U.S. 630, 640 (2004).

180 New York v. Quarles, 467 U.S. 649, 653 (1984).

181 Illinois v. Perkins, 496 U.S. 292, 294 (1990).

tine booking;[182] permitting police to renew questioning if a suspect initiates additional conversation, or after sufficient passage of time;[183] requiring that a suspect use precise language to invoke the right;[184] permitting police to use "fruits" of non-*Mirandized* statements;[185] permitting impeachment use of non-*Mirandized* statements,[186] holding prolonged silence following *Miranda* warnings insufficient to invoke its protection,[187] and that silence during noncustodial questioning may be used as impeachment.[188]

This welter of Supreme Court rulings takes the form of a detailed code, and it includes institutional analysis of the circumstances with which waivers will be inferred, whether police noncompliance should result in exclusion, and the incentives and needs of police during investigations. This is not constitutional common law but rather a constitutional evidence law developed in a common-law fashion, as part of a concerted set of moves to blunt the practical evidentiary impact of the *Miranda* rule outside the core Fifth Amendment concern with admission of "unwarned," self-incriminating statements at trial.[189] The result is not deference to evidence law but rather the creation of a constitutional evidence code, accompanied by rules of pretrial and trial practice regarding the preservation and waiver of rights concerning such evidence, and the remedies for violation of the evidentiary right. As such, however, I have argued here that neither the rule announced in *Miranda*, nor the body of case law interpreting its scope that followed, is exceptional.

Is *Miranda* really so exceptional? It appears unusual when viewed alongside other constitutional rights that regulate executive action, or the content of legislation, or procedural rights that arise for the first time at a criminal trial. It appears far less unusual in the context of other Fifth Amendment rulings, since the Fifth Amendment privilege has itself been much elaborated as to its application in a range of contexts, from civil, criminal,

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182 Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990).

183 Missouri v. Seibert, 542 U.S. 600, 611–12 (2004) (plurality opinion); Oregon v. Elstad, 470 U.S. 298, 318 (1985); Oregon v. Bradshaw, 462 U.S. 1039, 1043–44 (1983); Edwards v. Arizona, 451 U.S. 477, 485 (1981); Michigan v. Mosley, 423 U.S. 96, 103–04 (1975).

184 Connecticut v. Barrett, 479 U.S. 523, 527–30 (1987).

185 United States v. Patane, 542 U.S. 630, 633–34 (2004).

186 *See* Oregon v. Hass, 420 U.S. 714, 722–23 (1975); Harris v. United States, 401 U.S. 222, 226 (1970).

187 Berghuis v. Thompkins, 560 U.S. 370, 380–82 (2010).

188 Salinas v. Texas, 133 S. Ct. 2174, 2179–80 (2013).

189 *Patane*, 542 U.S. at 633–34.

to administration cases and during post-conviction review, together with rules for its waiver.[190] As noted, however, constitutional scholars have long puzzled over what status to accord *Miranda*. Scholars have made efforts to categorize *Miranda* using the language of constitutional common law,[191] or subconstitutional safeguard,[192] or decision rules versus remedies.[193] The focus of the doctrine is admissibility in court of out-of-court statements, and yet the rule provides a set of warnings to be given by police in an interrogation room.

Those scholarly efforts can be simplified: *Miranda* is constitutional evidence law. If seen as evidence law in the narrow sense of establishing a condition for the admissibility of an interrogation statement, it seems like a narrow type of evidentiary rule. But seen as a part and parcel of a broader regulation of the conditions for waiver of Fifth Amendment rights and the protection of the privilege in and out of court, *Miranda* fits in well with the larger body of constitutional doctrine. I have developed in Parts I and II of this Article how in a host of areas, constitutional law and evidence law inform each other and are developed in a mutual way. *Miranda* does not look like a merely "prophylactic" right from an evidence-law perspective, since evidentiary rights commonly operate in just that fashion, accompanied by rules surrounding pretrial waiver and trial practice-related rules and remedies for any violation. As described in Part I, there is nothing unusual in evidence law about the concept that out-of-court conduct, and even warnings providing notice that an evidentiary right may be waived if not asserted, must be given to a person in order to properly preserve evidence for use in court. Evidentiary privileges may be waived if they are not asserted in a timely manner at the appropriate phase of litigation or an investigation. Failure to provide warnings that waiver might result, however, may sometimes bar the subsequent use of the evidence, but still additional rules may develop the scope of such trial remedies, which may include jury instructions given as an alternative to exclusion of the evidence.

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190 *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 311–12 (1991) (holding that Fifth Amendment violations may be found to be harmless errors); Kastigar v. United States, 406 U.S. 441, 444 (1972) (holding that the privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory").

191 *See* Merrill, *supra* note 16.

192 *See* Abramowicz, *supra* note 17.

193 *See* Berman, *supra* note 1, at 127.

And nor is it surprising that evidentiary rules for the proper litigation of constitutional rights would have to be elaborated in the Fifth Amendment setting, in which the constitutional right is intimately concerned with evidence admitted in court. Thus, I argue that *Miranda* is no outlier and not an example of exceptional treatment by the Supreme Court. It mirrors the approaches taken by the Court in due process rulings, Confrontation Clause rulings, exclusionary rule cases, and the other areas examined in this Article. A mixture of constitutional values and evidence-law approaches animates the doctrinal result of the collision of the two. What is unsatisfying is something different: the lack of clarity concerning why different outcomes can result in different constitutional and evidence-law contexts. That is the problem to which I turn in Part III.

III
DEFINING THE RELATIONSHIP OF THE CONSTITUTION AND EVIDENCE LAW

Judges and scholars have struggled over questions whether constitutional rules such as the exclusionary rule are substantive or remedial,[194] whether *Miranda* is truly constitutional or a prophylactic, or whether punitive damages rulings represent substantive or procedural due process. These constitutional debates cannot be avoided in many contested areas, given the difficulties of untangling substance from procedure. However, in the areas discussed, I have offered a solution to the category problem, at least. Such questions can be more comfortably seen as lying at the intersection of constitutional law and evidence law, in which the right and the remedy both relate to questions of what evidence may be admissible at a trial and how it should be presented at trial. There is not the same distinction between substance and procedure or right and remedy, where the questions are procedural in a sense but also linked to the nature and substance of the evidence and the values underlying its collection, introduction, and weight.

Nor can constitutional rights be always understood as separate from their application in the courtroom, regarding what evidence may or may not be presented, both when constitutional rights are "specific" and directly regulate evidentiary matters, and when constitutional rights more generally seek to prevent unfair outcomes at trial. A richer understanding of not

194 *Id.* at 8 n.27.

only constitutional considerations underlying courts' reluctance or desire to supplement evidence law but also of the values underlying evidence rules, is warranted to better inform this entire area. This Part turns from the definition of the problem as one of the intersection and potential conflict of constitutional rights and evidence law to potential solutions. This Part aims to develop connections between those values, summarizing certain work by evidence scholars and then setting out a framework for identifying and then adjudicating conflicts between constitutional law and evidence law.

A. Evidence Law Principles and Values

The preceding parts describe some situations in which constitutional rulings take cognizance of evidence law and some in which they do not. Conversely, evidence codes are often written without any recognition that constitutional rights apply. For example, the Federal Rules of Evidence simply note that relevant evidence will typically be admissible, unless the U.S. Constitution or federal law or evidence-law sources state otherwise.[195] The commentary to Federal Rule of Evidence Rule 402 highlights how "[t]he rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence."[196] Any constitutional rights operate separate and apart from the rules of evidence.

Although state and federal rules of evidence generally favor admissibility, as noted, absent some rule, statute or constitutional right barring admission, reliability is a central concern in the law of evidence.[197] Reliability is not often embraced in constitutional rulings, however, even when the term "reliability" is deployed. In the exclusionary rule context, "reliability" refers to nonexclusion of evidence, and not whether the particular evidence is actually reliable in a given case. The nonexclusion concern is valid, but "reliability" is a misleading term to use. In a few areas, such as in the eyewitness-misidentification area, reliability is used correctly, but reliability concerns are not adequately reflected in the doctrine. And to be sure, most evidence codes do not contain detailed rules designed to ensure reliability through empirically validated provisions. *Crawford* may have displaced hearsay rules that reflected reliability concerns, but traditional hearsay doctrine, with its complexities

195 *See* FED. R. EVID. 402.
196 FED. R. EVID. 402 advisory committee's note.
197 *See id.*

and many exceptions, is an extremely rough guide to reliability and has been much criticized in its particulars and its implementation by generations of scholars and judges.[198] Where evidence law cannot easily get reliability right and tends, when in doubt, to prefer admissibility of the evidence, perhaps it is no surprise that constitutional law most often does the same.

As evidence law changes, however, the approach towards reliability may shift. More state courts are now turning to their own law of evidence as a source for developing more detailed rules concerning reliability of eyewitness identification evidence; some of these experiments may prove successful, while others may not.[199] State courts can and should rely on evidence law to supplement a constitutional test since, after all, most constitutional rules are designed only to address extreme unfairness or particular procedural guarantees. Perhaps states would do so more often if it was clearer that a constitutional right serves a more narrow purpose. The Supreme Court's so-called "reliability" test for eyewitness identifications may give the impression that it is a test well designed to assess reliability, which it is not, despite the repetition of the word "reliability" in the Court's *Manson v. Brathwaite* opinion. Now that more research has shown just how outdated the test is, more state courts have supplemented that test with their own rules, as they have already done by opening the doors towards admissibility of expert testimony on eyewitness evidence.[200] Perhaps over time, these developments in the states will influence the constitutional standard.

Reliability is far from the only important value served by evidence rules, of course. As the commentary to Federal Rule of Evidence Rule 403 explains, "[e]xclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities."[201] Even reliable evidence may be too prejudicial in its impact.

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198 *See, e.g.*, Rupert Cross, *What Should Be Done About the Rule Against Hearsay?*, 1965 CRIM. L. REV. 68, 80–84 (likewise arguing for the reform of British hearsay doctrine); Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 218 (1948) (arguing for reform of hearsay doctrine: "[S]hould we not recognize that the rational basis for the hearsay classification is not the formula, 'assertions offered for the truth of the matter asserted,' but rather the presence of substantial risks of insincerity and faulty narration, memory, and perception?").

199 For a prominent example of a state court using scientific research to inform the interpretation of state reliability rules in the area of eyewitness-identification evidence, see *State v. Lawson*, 244 P.3d 860, 872–873 (Or. Ct. App. 2010).

200 *See* NATIONAL RESEARCH COUNCIL REPORT, *supra* note 165, at 34–37.

201 FED. R. EVID. 403 advisory committee's notes.

The concern with confusion to the jury, in an area that risks constitutional violations, was present in some of the Supreme Court rulings discussed, for example, in punitive damages rulings, as well as rulings highlighting the unique prejudicial impact of a statement of confession by a criminal defendant. In the area of expert testimony, many courts use a test asking whether the expert's testimony "assists the fact finder" or is beyond common knowledge.[202] Many of those assumptions were based on rules of thumb, or views of the traditional functions of the jury, such as that credibility is seen as the province of the jury, and scholars have criticized the case law for years.[203] Trial court rulings on what does or does not confuse jurors themselves could also be better informed by research; perhaps if it was, constitutional rulings would be better able to engage with important questions relating to what assists the jury.

Evidence rules may also serve procedural values. Evidence rules that err on the side of admissibility can serve to permit the parties to have a full and fair day in court; the Confrontation Clause serves such goals, as do a range of due process rules.[204] As a result, due process and fair trial constitutional rights may serve similar goals as evidence rules designed to permit both sides to have a full hearing; perhaps that explains why often such rights are seen as compatible with evidence rules. Then again, there may be debate over which values evidence rules or constitutional rules in fact serve. Confrontation Clause rulings for some time emphasized reliability as a central value served by confronting witnesses, while in *Crawford* the Court rejected reliance on "amorphous notions of 'reliabil-

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202 Michael Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSCHYOL. PUB. POL'Y & L. 909, 923 (1995).

203 *See, e.g.*, EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE § 2.1.3 (2014) (describing how "courts continue to exclude expert testimony because it is either not necessary, not 'beyond the ken of the jury,' or not 'beyond the common knowledge' of the average layperson. These courts incorrectly believe that the 'assist the trier of fact' requirement of Rule 702 and state equivalents restate the common law." (citations omitted)); Michael W. Mullane, *The Truthsayer and the Court: Expert Testimony on Credibility*, 43 ME. L. REV. 53, 64 (1991) (criticizing the common law of evidence for not taking into account scientific evidence regarding the reliability of eyewitnesses).

204 *See* Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three-Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 626 (1992); Andrew E. Taslitz, *Catharsis, the Confrontation Clause, and Expert Testimony*, 22 CAP. U. L. REV. 103, 130 (1993) ("The right to confront witnesses is directly related to these notions of perceived procedural justice."); Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence,* 52 MD. L. REV. 1, 59–63, 89–90, 92, 115–19 (1993).

ity.'"[205] The Court then explained: "the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee."[206] The "crucible of cross-examination" promotes reliability in the Court's view, but the constitutional test does not itself involve a form of reliability review.[207] Thus, the Court, even when rejecting a test that conformed to common-law hearsay rules, nonetheless made efforts to explain why the constitutional test was compatible with evidence-law values. The reasoning in *Crawford* shows how, depending on the level of generality, inconsistent rules can be found to serve broadly compatible goals. A full airing of the potential conflict, however, can at least serve to more clearly explain why a procedural constitutional rule was selected over an evidence-law-based rule.

Evidentiary privileges may also serve more complex professional and institutional values. Privileges may serve an "instrumental rationale" to promote communication with professionals, such as lawyers, doctors, and between spouses, that evidence law has long recognized as socially valuable.[208] Regarding the attorney-client privilege, the Supreme Court has explained, "[t]he purpose of the privilege is to encourage clients to make full disclosure to their attorneys."[209] Evidentiary privileges also serve more "humanistic" privacy and autonomy interests in the ability to make choices in consultation with professionals.[210] And limitations and exceptions to such privilege rules may address a range of values, including litigation-fairness concerns, litigation-cost concerns, detection of crimes, and the interests of enforcement agencies, among other policy considerations.[211] Sixth Amendment right to counsel protections relate to and, in some settings, overlap with concerns reflected in attorney-client and work-product privilege law.[212]

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205 Crawford v. Washington, 541 U.S. 36, 61 (2004).

206 *Id.*

207 *Id.*

208 Imwinkelreid, *supra* note 203, at § 5.2.

209 Fisher v. United States, 425 U.S. 391, 403 (1976); *see also* Jaffee v. Redmond, 518 U.S. 1, 15–16 (1996) (discussing "public goals" supporting recognition of psychotherapist-patient privilege).

210 Imwinkelried, *supra* note 203, at § 5.2.3.

211 *See, e.g.*, FED. R. EVID. 502(b) (extending protection to inadvertent disclosures during federal proceedings or enforcement investigations). Regarding the crime-fraud exception to the attorney-client privilege, see MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2), (3).

212 Regarding privacy of attorney-client communication and Sixth Amendment rights, see 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.8(b) (4th ed. 2004).

The focus of the Court on the "deterrence rationale" related to constitutional violations is not unrelated to concerns reflected in some evidentiary doctrines on deterring different types of socially harmful behavior. Such intersections, where constitutional values may reinforce evidentiary values, might profitably be developed both in scholarship and in caselaw.

B. The Compulsory Process Clause

One area in which the lower courts have been tasked with explicit balancing of constitutional and evidence-law values is in the Compulsory Process Clause of the Sixth Amendment. The area offers positive lessons, in that the tension between constitutional rights and evidence-law interests is often clear, made clear by the relevant case law, and there is a large body of lower-court law applying it. As in other areas discussed in Part I, under the Compulsory Process Clause there has been a parallel turn in the law from evidence-law sources to a separate and (sometimes) superseding constitutional test. There is no constitutional provision recognizing a general right to present evidence in criminal cases. However, the Sixth Amendment Confrontation Clause and Compulsory Process Clause recognize rights to confront and obtain witnesses in the favor of the accused.[213] As discussed above, procedural justice values are served by preserving the ability to present evidence, and to some extent, evidence law reflects such values. However, over time, the common-law rules of evidence developed to impose real barriers in presenting evidence.[214] Most notably, the common law largely disqualified potentially interested witnesses, making it difficult for parties in civil cases to testify at all (since they might be biased or have incentives to lie) and making it difficult for criminal defendants to call witnesses (including themselves).[215]

For over a century, federal courts simply followed the common-law approach. For example, in *United States v. Reid*, two defendants jointly charged with murder on the high seas sought to call each other as witnesses; while noting that the Sixth Amendment was designed to prevent common-law rules from limiting witness testimony, including in serious criminal

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213 *See* U.S. CONST. amend. VI.

214 *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 500 (1999).

215 For example, in felony and treason cases, common law did not permit the defense to call witnesses at trial at all. *See* 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1786 (1st ed. 1833).

cases, the Court explicitly held that the rules of evidence in federal courts were those adopted by the states when the Judiciary Act of 1789 was adopted, and those rules in effect trumped any Sixth Amendment concerns.[216] In 1918 the Court overruled *Reid,* relying on statutory changes to the federal criminal code, but also stating that it would not be bound by "the dead hand of the common-law rule of 1789," and stating "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case."[217] Nevertheless, the Sixth Amendment's Compulsory Process Clause was still seen as accommodating in some respects the "dead hand" of common-law or state law privileges.

Beginning in the late 1960s, the Supreme Court changed course, incorporating the right as against the states, and finding that the Clause, largely due to related Due Process Clause concerns, sometimes permits a defendant the right to introduce evidence even in contravention of such evidentiary privileges.[218] In the case of *Washington v. Texas,* the Court incorporated the Compulsory Process Clause as fundamental under the Due Process Clause and explained that this constitutional concern applied to categorical evidence-law rules excluding certain types of witness testimony: "It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief."[219] For example, in *Pennsylvania v. Ritchie*, the Court concluded that despite a state rule that would have protected certain victim statements made to a child victim's service agency as privileged, those materials must be turned over to the judge, examined in camera, and information potentially

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216 53 U.S. 361, 363 (1851).

217 Rosen v. United States, 245 U.S. 467, 471 (1918).

218 *See* 8 JOHN HENRY WIGMORE, EVIDENCE § 2191 (John T. McNaughton rev. ed. 1961) (describing how at the time, the right to compulsory process did "not override and abolish such exemptions and privileges as may be otherwise recognized by common law or statute"); Washington v. Texas, 388 U.S. 14, 17–19 (1967); Welsh S. White, *Evidentiary Privileges and the Defendant's Constitutional Right to Introduce Evidence*, 80 J. CRIM. L. & CRIMINOLOGY 377 (1989) ("Since 1967, Supreme Court decisions based on the compulsory process clause, the confrontation clause, and the due process clause have held that in some situations the defendant's right to present relevant evidence in her defense must override evidentiary rules to the contrary.").

219 388 U.S. at 22.

useful to the defense disclosed.[220] In a different context, implicating the Due Process Clause but also the Compulsory Process Clause and the Fifth Amendment, the Supreme Court held in *Rock v. Arkansas* that the right to testify on one's own behalf was so important that it overcame serious reliability objections in state court due to the fact that the defendant's testimony was "hypnotically refreshed."[221] The constitutional right and its procedural justice values trumped potentially quite serious reliability concerns.

That said, these cases emphasize that while categorical or per se state hearsay rules may be unconstitutional as applied, the right to present evidence may or may not be violated depending on the facts and circumstances.[222] Most defense attacks on application of evidentiary privileges, ranging from attorney-client privilege, to physician-patient privilege, to spousal privilege, to psychotherapist-patient privilege, to marriage counsel-client privilege, have failed.[223]

Since the constitutional test permits balancing depending on the "circumstances," courts may highlight the important policies and privacy interests protected by the particular type of privilege, including "tension" between the constitutional rights of a criminal defendant and the rights of an alleged crime victim.[224] As a result, the constitutional test can flexibly accommodate evidence-law values in a way that can prevent extreme denial of a defense and bars imposing absolute or per se rules; instead lower courts (and perhaps the evidence rules themselves) must articulate the specific purposes of accommodating the privilege in a particular case. The result may generate more informed evidence law and constitutional law. The result is not, however, a model of clarity. While I describe in the sections that follow a marching order of steps that courts might follow to break down whether there is a conflict and what analysis might resolve it, any intersection between complex evidence-law rules and constitutional rights is bound to pro-

220 480 U.S. 39, 58 (1987).

221 483 U.S. 44, 58–61 (1987).

222 *Id.* at 62 (criticizing a state's "per se rule" against post-hypnosis testimony based on "circumstances" present in the case); *see also* Imwinkelried, *supra* note 203, at § 11.3.2 (2014) ("[T]he precedents bear out the conclusion that the courts ought to utilize as-applied balancing analysis in adjudicating the constitutionality of evidentiary rules attacked under the accused's constitutional right to present a defense.").

223 Imwinkelried, *supra* note 203, at § 11.4.2.

224 *See id.* (citing United States v. Friedman, 636 F. Supp. 462, 463 (S.D.N.Y. 1986); Commonwealth v. Bishop, 617 N.E.2d 990 (Mass. 1993); State v. Roper, 836 P.2d 445 (Ariz. Ct. App. 1992)).

duce complex results. This makes it all the more important that the analysis be transparent.

C. Influence of Constitutional Rulings on Evidence

A general reluctance to interfere with evidence law no longer exists, if it ever did exist apart from its invocation in particular settings for particular reasons. Justice Jackson's famous passage in *Michelson* reflects a real reluctance to interfere with evidence law for specific reasons having to do with the doctrine in question, and in a range of areas, the Supreme Court has tried mightily to accommodate constitutional rights to the traditional evidence-law rules. The due process revolution similarly reflects an inevitable tension, reflecting a highly selective distaste for regulating the reliability of evidence in criminal trials, a more conflicted approach towards damages in civil trials, and a desire to leave such matters to state evidentiary rules, while the Court has nevertheless taken on in its Confrontation Clause jurisprudence ambitious efforts to supplant traditional evidence-law rules. Conflict between constitutional interpretation and evidence law is here to stay. I suggest that clarifying if not resolving those conflicts may require greater attention to evidentiary concerns.

The Supreme Court is understandably primarily focused on developing a constitutional right, and not on the trial procedure or evidence rules that will be affected when the rubber meets the road and the constitutional right is litigated in lower courts. Perhaps given more time, if the Court revisits the issue, if an egregious misuse of a constitutional ruling catches the Court's attention, as in *Crane v. Kentucky*, conflicts in the lower courts can be resolved.[225] However, evidentiary questions may not easily be preserved, and the Court takes so few cases each year. Then again, that has not stopped the Court from hearing quite a few *Crawford*-related cases. Perhaps the Court's attention to the potential evidentiary implications of its ruling simply depends on whether the current set of Justices' interests are sufficiently aroused, as with any type of constitutional question, given the Court's discretionary docket. If a group of Justices loses the appetite to engage with a problem, like eyewitness memory or the review of state punitive damages verdicts, then the constitutional standard may remain unaltered, and evidentiary issues will remain unresolved. Selective attention is inevitable in an era of shrinking Supreme Court

225 476 U.S. 683, 690–91 (1986).

dockets.[226] In my view, more attention should be directed towards areas in which evidentiary uses outright conflict with the underlying purposes of the constitutional right. Lower courts can play a more prominent role when that does occur, but the Court has not specified the details of the various evidentiary uses.

The areas in which state and lower courts have instead arguably misused language from constitutional rulings share a common theme: that having defined the constitutional right, the Supreme Court had not offered clear rules on how to appropriately evaluate evidence affected by a constitutional violation. For example, where the Court had not adequately described what makes for reliable eyewitness-identification evidence, lower courts may have adopted language from an authoritative source—the Supreme Court—without any better options and with the view that quoting the Court was unlikely to result in an appellate reversal.[227]

Confining the analysis to the areas in which a constitutional right is implicated, I suggest that commenting on the quality of evidence may actually be an important role for appellate and post-conviction courts, even if constitutional rights only permit a remedy in cases of egregious evidentiary rulings. Recent opinions denying relief nevertheless can send signals to lower courts, even if the procedural posture of the cases did not permit sufficient direct engagement with the evidence. For example, in *McDaniel v. Brown*, the Justices commented on "the prosecutor's fallacy," and other errors and "faulty assumptions," in the presentation of statistics regarding a DNA test, and ultimately denied relief because of the high standard to prevail on a *Jackson v. Virginia* sufficiency of the evidence claim.[228] The Court's strong language concerning the nature of those errors in the presentation of the DNA evidence, however,

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226 *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1252 (2012); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366 (2006).

227 For an essay that builds on the analysis in this Article and explores these lower-court rulings in some detail, see Brandon L. Garrett, *Mis-constitutionalized Evidence Law* (Feb. 10, 2015) (unpublished manuscript) (on file with author).

228 McDaniel v. Brown, 558 U.S. 120, 128, 132 (2010). In addition, the Court denied relief on a "newly minted" due process claim not presented below that the DNA testimony was an "unreliable" form of identification testimony, analogous to a suggestive eyewitness identification. *Id.* at 135–36.

may powerfully influence lower courts, as scholars have suggested.[229]

In *Cavazos v. Smith,* the Supreme Court denied relief on another *Jackson v. Virginia* claim in a case involving shaken baby syndrome (SBS) evidence, emphasizing both statutory rules requiring deference in federal habeas corpus, and that "it is the responsibility of the jury—not the court—to decide what conclusions should be drawn from evidence admitted at trial."[230] However, the Court noted disputes regarding the medical evidence concerning cause of death at trial, and based on new medical evidence and advances in the research, the Court stated: "Doubts about whether Smith is in fact guilty are understandable."[231] Indeed, the Court noted that clemency might be appropriate, and the Governor subsequently did grant clemency in the case.[232] In dissent, Justice Ginsburg argued, "What is now known about shaken baby syndrome (SBS) casts grave doubt on the charge leveled."[233] A discussion of that type about the state of the research and the reliability of the medical testimony in question may have a real impact on presentation of SBS testimony in lower courts, even if given the procedural posture of the case, no relief was granted. When lower federal courts and state courts do the same, they can similarly impact the quality of evidence development, even when denying relief on a constitutional claim.

Whether the Supreme Court in particular is well equipped, in contrast to lower state and federal courts, or legislatures or rules committees, to examine specialized evidentiary questions or conduct independent research is a troubling question (as is the question whether more attention should be paid to use of extra-record or legislative facts in constitutional interpretation more generally).[234] Given the limited number of cases that the

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229 James S. Liebman, Shawn Blackburn, David Mattern & Jonathan Waisnor, *The Evidence of Things Not Seen: Non-Matches as Evidence of Innocence*, 98 IOWA L. REV. 577, 615 (2013) ("The Supreme Court's recent recognition that allowing jurors presented with DNA to operate under the prosecutor's fallacy when evidence may be 'fundamentally unfair' will no doubt accelerate the search for solutions, including potentially the routine use of Bayes' Theorem to highlight the role of prior odds.").

230 132 S. Ct. 2, 3–4 (2011).

231 *Id.* at 7.

232 *Id.*; *see also* Michael Robinson Chavez, *Jerry Brown Commutes Grandmother's Murder Sentence*, L.A. TIMES (Apr. 4, 2012, 11:27 AM), http://latimesblogs.latimes.com/lanow/2012/04/shaken-baby-clemency.html (stating governor had "significant doubts" about guilt).

233 132 S. Ct. at 9 (Ginsburg, J., dissenting).

234 *See* Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1263 (2007) ("[J]udges facing unfamiliar and complex scien-

Court hears, the state of the factual record when cases do appear before the Court, and the Court's limited ability to develop facts much less assess how well they are developed at trials, the Court may be right to sometimes tread cautiously. However, one theme of this Article is that the Court's sometimes stated deference to evidence law is highly selectively invoked and may not be a compelling excuse for failing to address the substance of the claims raised.

The Supreme Court's role in policing the application of constitutional rules in trial litigation is even more complex when it is interpreting general constitutional rules that will apply across different jurisdictions with some variation in evidentiary practices. Perhaps when the rules are uniform, the Court has a clearer role to play. It is a separate topic how the Federal Rules of Evidence, and the Supreme Court's interpretation of those rules, impacts other courts. For example, *Daubert* has been adopted as codified in the Federal Rules of Evidence, and by most states, either formally or informally. It is not clear how well such decisions speak to those that generate evidence in the first instance. For example, we do not know whether the Court's Confrontation Clause decisions have actually improved the quality of forensics work in laboratories, and there is every reason to think that they have not. It is possible that *Daubert* and its progeny have encouraged litigants (or even researchers) to generate more accurate scientific evidence for use in the courtroom, but there is every reason to think that any effects are small.[235]

D. Identifying Conflicting Constitutional and Evidence Rules

As I have described, the problem of reconciling constitutional rights to evidence-law rules extends to still additional areas, including a range of areas important in criminal trials, and from U.S. Supreme Court rulings into state court pattern instructions. Language from constitutional rulings must be

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tific admissibility decisions can and should engage in independent library research to better educate themselves about the underlying principles and methods."); Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1305–11 (2012) (comparing "minimalist" and "maximalist" approaches to "in-house fact finding").

235 For skeptical accounts, see David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 NOTRE DAME L. REV. 27, 28–29 (2013); Lisa Heinzerling, *Doubting* Daubert, 14 J.L. & POL'Y 65, 70–74, 82–83 (2006); Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 273 (2006).

applied in civil and criminal litigation, and the ways that constitutional rulings influence broader areas of practice is a larger and unwieldy subject. This is a problem shared by the Supreme Court and by lower courts. And yet there are no ground rules for how to resolve conflicts between constitutional rights and evidentiary rules. In some contexts, the Court claims to rely on text and the specificity of the constitutional right, but a range of additional considerations seem to predominate as a descriptive matter, including concerns of reliability, deterrence, federalism, finality, seriousness of the violation, underlying evidence-law clarity, and underlying evidence-law values.

As a preliminary matter, I believe that courts, having observed the potential for a conflict, should provide guidance on evidentiary implications of constitutional rulings. The *Daubert* decision, for example, was intended to provide factors that would guide lower courts, as were decisions that followed[236]; whether or not the Court successfully provided useful guidance is another question, but at least the Court knew full well what it had set out to do. One initial recommendation is that courts should at minimum clarify differences between what is meant by the language of constitutional tests and the preexisting backdrop of evidence-law rules. Given the deferential and appellate context in which constitutional evidence claims may be commonly litigated, such rules of the road can be particularly important.

When a constitutional or subconstitutional standard uses the term "reliability," is that a placeholder for nonexclusion of any type of evidence, or does a court really mean to refer to evidentiary concern with the reliability of the evidence? Clearer definitions would help, but connection and conflict is inevitable. More work should be done to define principles independent of surrounding evidence rules. Perhaps it is far easier to regulate due process rules regarding fair defense and no outright falsification of evidence than Confrontation Clause type rights, in which an entire body of new doctrine must be created. After all, due process rules may share an underlying concern with reliability and can overlap with concerns expressed in rules of evidence like Federal Rule of Evidence 403. Even if constitutional interpretation requires very different

236 *See, e.g.*, Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147–53 (1999) (applying *Daubert* to non-scientist experts); General Electric Co. v. Joiner, 522 U.S. 136, 138–39 (1997) (establishing abuse of discretion as the standard of review for a trial court's rejection of scientific evidence).

methods and the values underlying a particular provision depart from evidentiary concerns, a court will necessarily want to examine whether a constitutional right improves accuracy of outcomes.

Is the constitutional right violated if certain types of evidence are considered at a civil or criminal trial? Does the right require suppression of highly reliable evidence? Or does it in fact help ensure more reliable judgments? Does the right provide guidance to jurors, or should jurors be trusted to reach decisions in the area without further guidance? Does the right improve upon traditional evidentiary rules or impose real costs to litigation? Those costs may be justified, but if they are not discussed or analyzed then they cannot be weighed properly. And other actors may use their discretion to avoid the consequences of a rule that imposes costs on their work, or to conceal evidence of its violation, making the constitutional rule moot or distorting its operation. The Supreme Court has reached very different answers to those questions in different branches of its due process jurisprudence, demanding quantified precision and expressing skepticism of juries when imposing punitive damages on corporations, but expressing reluctance to regulate accuracy of evidence such as eyewitness evidence that may place individuals in prison.

In contrast, a norm of deference to evidence law does not begin to explain the Supreme Court's varied constitutional rulings. The Court should instead do more work to justify why, for example, the Due Process Clause requires careful assessment of evidence in some areas and not in others. Simple rubrics could improve the area, mirroring canons of constitutional avoidance and construction widely used by courts.

E. Reviewing Conflicting Constitutional and Evidence Rules

A court should first describe whether there is a conflict between the constitutional right and an evidence-law rule. The Supreme Court has identified as a situation in which constitutional law might "trump" evidence law, as noted, as one where there was a "specific constitutional right" and a procedure providing a "specific remedy."[237] Such language begs the question

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237 Spencer v. Texas, 385 U.S. 554, 565 (1967) (noting "the emphasis there was on protection of a specific constitutional right, and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury." (citing Jackson v. Denno, 378 U.S. 368 (1964))).

why the constitutional right was interpreted to provide a "specific" remedy. Certainly, constitutional text should always be the starting place. However, one is unlikely to encounter a state law that runs directly afoul of the text of a constitutional right. Instead, an evidentiary ruling may fail to provide relief on an objection also raising a constitutional (as well as evidentiary) claim, and the question may come up on appeal whether the trial court failed to adequately protect the constitutional interest.

One could imagine an approach involving three steps in clarifying a conflict. First, a court should first articulate which evidentiary practices implicate constitutional concerns. In some of the Supreme Court's constitutional rulings, for example, the particular evidentiary rules implicated by a possible interpretation are not clearly identified. Second, the court should ask whether there is a conflict or not between the constitutional right and that evidentiary rule or rules. A conflict would exist if an evidentiary rule would call for evidence to be excluded at a proceeding but a constitutional rule would call for that evidence to be admitted. A conflict would similarly exist if an evidentiary rule would permit the evidence to be admitted at a proceeding but a constitutional rule would call for the evidence to be excluded. A different type of conflict could occur not as to the result but the rationale, if both rules would counsel the same result but for different reasons. Clarifying the different reasons might be useful, but in such a case a court need not reach a constitutional question at all.[238]

Third, the court could then ask whether the conflict can be avoided by a narrower construction of the constitutional right, interpreting the right as compatible with evidentiary concerns. Whether a doctrine of constitutional avoidance, outright, is

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238 No required "order of battle" would be necessary, of course. Addressing the merits of a constitutional question has much to recommend it, for a range of reasons, much developed in the context of qualified immunity and constitutional torts by Professor John C. Jeffries, Jr. and others. *See* John M.M. Greabe, *Mirabile Dictum!: The Case for "Unnecessary" Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 407–08 (1999); John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 116–17 (2009); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 49 (2002). For the argument that judges should tend to have discretion to treat the nonconstitutional merits question first, see Thomas Healy, *The Rise of Unnecessary Constitutional Rulings*, 83 N.C. L. REV. 847, 857 (2005); Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1275–81 (2006).

preferable is a larger question.[239] In an area involving a potentially complex intersection, clearly defining the evidence-law rule and the constitutional right is itself an important goal. A doctrine of constitutional avoidance would serve less of a purpose if the potentially conflicting rules are themselves clearly set out. There is no need to avoid conflict if there is no conflict.

An explicit avoidance canon may not be justified in the same way in the evidence arena as when interpreting federal statutes. Many canons of statutory interpretation, broadly speaking, are thought to prefer continuity of practice and require clear statements of various kinds in statutory text, in order to justify a disruption to pre-existing practice.[240] State and federal evidence rules are nonconstitutional, and ruling based on an interpretation of those rules can avoid the need to reach a constitutional question (just as the Supreme Court will not rule if there is an independent and adequate state law ground supporting a state court's decision[241]). In the context of statutory interpretation, the judicial deference is chiefly due to legislative judgments, including as expressed in text, and typically conceived as a legislative supremacy question of whether a federal court should defer to Congress.[242] In contrast, evidence law arises from more complex and sometimes overlapping sources, sometimes without authoritative statutory text, including common-law rules, legislative codes, state and federal judges' interpretations of those rules, and state or federal judiciary committee-drafted jury instructions. The same considerations do not necessarily apply where evidence law is judge-made and state judge-made, or largely made by professional bodies of practicing lawyers. Nor is the preexisting practice always as opaque in evidence law. There are real concerns that appellate courts may lack adequate expertise, as well as concern with disruption of litigation and trial practice,

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239 *See generally* Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71, 90–97 (1995) (questioning whether the Court should always avoid constitutional questions whenever possible).

240 *See* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 944 (1992); Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1422 (2005).

241 *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

242 *See* William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831, 836 n.14 (2001).

together with concerns regarding facilitating or frustrating enforcement of the underlying civil or criminal matters. Those are the concerns reflected in Justice Jackson's statements expressing reluctance to interfere with the larger body of evidence law, and the Court's federalism-based deference to state evidence-law rules in some of its decisions.

Whether any general and normative canon preferring existing evidence-law rules is justified is doubtful.[243] I have called into question whether any such canon currently exists in actual practice. The Supreme Court, while stating a reluctance at times to interfere in evidence law, has never accorded such a view the status of a formal canon or rule of construction. Nor are evidence codes, as noted, to be interpreted in a manner resembling the elements of a statute. Any deference to evidence law would involve only the general principle of constitutional avoidance or general principles of federalism and deference to other rule-making bodies.

If the conflict cannot be avoided by a fully compatible interpretation of the constitutional right, then the constitutional right should "trump." Such outright conflict, however, will not always occur. In still additional areas, the constitutional right may help to vindicate evidentiary concerns (with fairness as reliability), and there may be special reasons to interpret the constitutional right to buttress evidence rules. To analyze such questions, particularly if a conflict has been identified, courts might then benefit from "*Brandeis* briefs" providing careful digests of lower-court evidentiary rulings, in order to carefully assess how constitutional rules are in fact being applied (and perhaps creating more incentives for lower courts to document such rulings or model rulings or instructions themselves).[244] If the evidence rule in conflict with the constitutional rule is an "outlier" and not accepted practice in a given state, or across the statutes, then there would not be the same degree of conflict or concern with supplanting the rule.[245]

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243 Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1586–87 (2000) (criticizing normative canons of construction).

244 A "Brandeis brief" refers to a brief relying extensively on scientific evidence, after Louis D. Brandeis's filings digesting social science research, particularly in Muller v. Oregon, 208 U.S. 412 (1908). *See* Brief for the Defendant in Error (No. 107), *Muller v. Oregon*, 208 U.S. 412 (1908), *reprinted in* 16 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 63 (Philip B. Kurland & Gerhard Casper eds., 1975).

245 *See generally* Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 930–48 (2014) (describing various categories of state law "outliers" displaced by constitutional rulings).

An explicit consideration of the content and policy of potentially conflicting evidence law would amount to a departure from a constitutional approach limited to interpreting the meaning of the constitutional text. As I have argued throughout, however, when a constitutional right regulates matters of evidence, the right and remedy are regularly interpreted based on the current policy and legal practice implicated. Conflicts between evidence rules and constitutional rules could be better resolved through a more formalized balancing test, or through levels of scrutiny, whether formalized or not. As discussed in the prior sections, such analysis should take far better account of the underlying purposes and values served by both evidence rules and constitutional rights. The problem is in some ways similar to that in any area, where as Professor Aaron-Andrew Bruhl has recently explored, the Supreme Court must consider, to some degree, lower-court precedent in elaborating a constitutional rule.[246]

However, evidence law requires knowledge of *practice*, and trial practice at that,[247] together with practical challenges in obtaining evidence and presenting facts during litigation. Lower courts may often be better situated to assess conflict between evidence and constitutional rules and to define the scope of remedies pretrial and at trial.[248] The problem is more complex and closer to the ground than the more standard situation in which state law rules or lower-court rules may or may not inform a constitutional rule.[249] And to be sure, as Professor Richard Fallon and others have emphasized, the Court and federal courts generally may have incentives not to bind themselves to rigid limitations on interpretive approaches.[250]

Evidence-law values and constitutional values will often coincide, particularly, I have argued, as to concern with relia-

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246 *See generally* Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851, 860–91 (2014) (surveying a variety of reasons that higher courts might justifiably defer to lower-court decisions).

247 For criticism of Supreme Court Justices' unfamiliarity with trial practice, see Kevin M. Clermont and Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 850–52 (2010).

248 Making that argument regarding the exclusionary rule, see Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 58 (1994).

249 Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 1022–26 (2004).

250 Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 1013 (2009) ("[T]he justices have seldom exhibited much interest in attempting to bind either themselves or each other, in advance, to the kind of general interpretive approaches [to constitutional adjudication] that academic theorists champion.").

bility. Weak and unreliable evidence that also may have been coerced from a suspect should be of greater constitutional concern than evidence that was coerced. Evidence rules and constitutional rules could strengthen each other. The Court has sought to rely on evidence rules at times, but not just to avoid conflict for its own sake. Courts could do still better by doing so to improve the quality of the underlying right. Failing to reconcile evidence-law values and constitutional values will lead to complex conflicts, and unless the courts try to create a complex series of trumps, the difficulty of reviewing evidence-law rulings on appeal creates a recipe for the underenforcement of constitutional rights. If the goal is to enforce constitutional rights, engaging with evidence law and trying to inform evidence rules, is necessary. Rules like the *Miranda* rule and the elaboration of the Court's Confrontation Clause rulings, then, look more like the necessary work to be done if a constitutional right is to have meaning at a trial. Far more work like that may have to be done in a range of other constitutional context for those rights to provide adequate protection at criminal and civil trials.

CONCLUSION

Courts should not interpret constitutional rights to needlessly overturn established rules of evidence but nor should they turn away from rulings that can minimize unconstitutional verdicts based on unsound or unreliable evidence. What my analysis suggests, first and foremost, is that avoiding the evidentiary problems raised by the interpretation of constitutional rights can create at least some of the very perverse consequences that courts often seek to avoid. Even if not quite accomplishing the opposite of the intended effect, displacing traditional evidence rules can create serious problems, since the courts must then create an alternative set of constitutional tests to cover all of the same ground and yet still somehow be compatible at the margins with evidence rules that do still apply. The Supreme Court's Confrontation Clause jurisprudence, even if the new test is a superior and constitutionally justified one, raises all of those difficult problems, and the solutions will likely increasingly rely on the rules of evidence.

My analysis also calls into question the Supreme Court's sometimes-stated aversion to regulating reliability of evidence, despite a central due process concern with reliability, particularly in criminal cases. Where highly unreliable evidence places a constitutional right in particular jeopardy, merely cit-

ing to the fact that traditional evidence law can in theory regulate reliability of evidence is no longer a convincing feint. Reliability of evidence is important to a range of constitutional rights, as are procedural justice concerns. An unreliable or outright false confession may implicate not only due process but also Fifth Amendment concerns. Unreliable punitive damages verdicts receive greater scrutiny in some respects under the Due Process Clause. Unreliable eyewitness identifications should implicate greater due process concerns, but the doctrine remains outdated and underdeveloped. An indigent defendant should receive the benefit of a needed and reliable expert witness. Outright false or unreliable convictions should receive greater post-conviction scrutiny consistent with the Due Process Clause emphasis on reliability.[251] And the Supreme Court, along with lower courts, will continue to grapple with how to reconcile the *Crawford* approach to the Confrontation Clause with a range of practical evidence-law concerns.

The solution, I have argued, is for courts to clearly articulate whether a constitutional right implicates evidential rules. Second, the court should ask whether there is a conflict between the constitutional right and that evidentiary rule or rules. Third, the court could then ask whether the conflict can be avoided by a narrower construction of the constitutional right, interpreting the right as compatible with evidentiary concerns.

What does this approach mean for constitutional interpretation more generally? In some respects, the proposed steps operate as rules of identification of nonconstitutional grounds and possible avoidance of constitutional questions. Such rules are used in other constitutional settings, primarily when reviewing legislation, as noted, or when avoiding a decision based on independent state law grounds. However, I have also argued that avoidance is not always possible or desirable when a constitutional right is in potential conflict with evidence law. At the final stage, courts can and should seek to accommodate constitutional and evidence-law concerns, or clearly define the differences in approach. Such reasoning does not require some other form of constitutional interpretation. For example, text or original meaning or precedent may play central roles in defining the constitutional right itself, but as I have argued,

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251 *See generally* Garrett, *supra* note 110, at 121–30 (analyzing data on convicts who were later exonerated by DNA evidence and concluding that modern criminal trial procedures generate a high likelihood of false convictions).

sometimes articulated and sometimes unarticulated policy considerations play an outsized role in interpreting the scope of that right and how it applies to affect evidence law. Civil and criminal practice, together with evidence law, has changed so much since the Founding and Reconstruction that history may be a poor guide in each of the relevant areas.[252] In the Confrontation Clause setting, as described, the Justices, having announced the Court's rule (relying heavily in *Crawford* on Founding-era sources), then had to engage in subsequent decisions with modern practice and applications of the rule. Thus, I do not take any position in this Article on the largest question regarding how courts should generally interpret the Constitution, a question, of course, about which Justices and judges themselves have disagreed. Instead, I have argued that in areas such as constitutional evidence law where policy often does matter to interpretation, the relevant underlying values should be clearly articulated.

When reliability or other evidence-law-based tests are deemed not workable, or are not desirable as a matter of constitutional interpretation due to a constitutional focus on procedural justice over reliability, as in the Confrontation Clause setting, then courts must still engage with questions of whether or how to accommodate constitutional rules with related evidence-law rules. Not only should the Supreme Court step in, as in *Crane v. Kentucky*, to correct evidentiary misuse of constitutional doctrine, but courts should positively engage with evidence-law rules and application. That is why it is a mistake to view rulings such as *Miranda* as an outlier or exceptional regulation of pretrial evidence gathering and preservation of privilege. Connections between evidence law and

252 Whether history provides any support for the Court's Confrontation Clause jurisprudence, for example, I leave to other scholars. For a skeptical view, see generally Thomas Y. Davies, *What did the Framers Know, and When did They Know it? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 120–89 (2005) (disputing as a historical matter Justice Scalia's contention in *Crawford* that "a rigid cross-examination rule was part of the American understanding of the 'common-law' confrontation right at the time the federal Bill of Rights was adopted"); Roger W. Kirst, *Does* Crawford *Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 77–87 (2005) (likewise arguing that "the ratification history shows that the Confrontation Clause is not a reference to the English common law of hearsay"); but see Richard D. Friedman, *The Mold that Shapes Hearsay Law,* 66 FLA. L. REV. 433, 434 (2014) ("However much one may quibble about details, the basic historical thesis of *Crawford* is correct: The confrontation right, as stated in the Sixth Amendment and recognized over centuries in the common law system, reflects a principle about how witnesses should give testimony—under oath, face-to-face with the adverse party, and subject to cross-examination.").

constitutional rights arise whenever a constitutional right relates to the criminal or civil trial process. Those connections do not simply take the blunt form of a constitutional right as a "trump" over evidence law, but rather require a more complex engagement between constitutional and evidence-law procedures and interests.

Justice Jackson had it right that it can upset the entire edifice to "pull one misshapen stone out of the grotesque structure."[253] But acting as if a constitutional right that directly regulates civil or criminal cases belongs to a different structure than the body of evidence rules governing civil or criminal trials cannot wish the problem away. Constitutional rules create rules of decision, but they can also impact rules of evidence. When judges interpret the Constitution, careful attention to the structure and potentially conflicting purposes of evidence rules is warranted, even when trying to avoid undue interference with the law of evidence. Constitutional rules can instead, in the most hopeful result, be interpreted to strengthen rights and improve the reliability of rules of evidence. A superficial interpretation of a constitutional right may avoid engaging with evidence-law applications, but it will not provide much guidance or protection during litigation.

Blithely avoiding evidentiary problems raised by interpretation of constitutional rights can lead to the collapse of the entire structure—the very "grotesque" result that the court sought to avoid. The exchange between constitutional law and evidence law should flow both ways. Constitutional rights can safeguard against evidence-law rules and litigation practices that place accuracy and fairness in jeopardy. In return, evidence law has something to offer constitutional theory: to improve the effectiveness of constitutional protections and to prevent unanticipated erosion of constitutional rights.

253 Michelson v. United States, 335 U.S. 469, 486 (1948).